TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 406

WILHELMINA SUMI, PETITIONER,

vs.

ALSIE M. YOUNG

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1936.

CERTIORARI GRANTED NOVEMBER 9, 1936.

SUPREME COURT OF THE UNITED STATES

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WILHELMINA SUMI, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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ATTORNEYS OF RECORD

LOUIS K. PRATT,
Fairbanks, Alaska,
Attorney for Petitioner and Appellant.

CECIL H. CLEGG,
Fairbanks, Alaska,
Attorney for Alsie M. Young, Appellee.

In the Probate Court, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, at Fairbanks, Alaska.

No. 549

In the Matter of the Estate of
MAYME HELEN YOUNG,
Deceased.

PETITION OF TESTAMENTARY GUARDIAN FOR ORDER FIXING AMOUNT OF BOND.

Comes now Alsie M. Young, petitioner, and respectfully represents and shows to the Court as follows:

I.

That he is a resident and inhabitant of the Town of Coleman, Michigan, and of the State of Michigan, and that he is a married man residing in said town and state with his family.

II.

That the above named decedent, Mayme Helen Young,. died testate in the Town of Fairbanks,

Alaska, on the 4th day of May, 1934; that at the time of her death she was a resident and inhabitant of said town of Fairbanks, Alaska; that at the time of her death as aforesaid, she left surviving her, amongst others, two minor children, to wit, George Houston Cook, age nine years, and Ruth Marion Cook, age eight years; that said minor children, George Houston Cook and Ruth Marion Cook, were and are the children of the said Mayme Helen Young and a former husband, George Cook; that, as affiant is informed and believes, and therefore alleges, the father of each of said children, George Cook, died at Anchorage, Alaska, on or about the 28th day of May, 1926, and that he has not, by last will or otherwise, appointed a guardian for either of said children; and that each of said minor children are now living in said Town of Fairbanks, Alaska, in the possession of one Wilhelmina Sumi.

III.

That prior to the death of the said Mayme Helen Young, mother of said minor children, and on the 21st day of March, 1934, she did make, execute, publish and declare her last will and testament in writing, which said last will and testament was, on the 7th day of May, 1934, duly admitted to probate in the above entitled Court and the above entitled proceeding; that by the terms [1*] of said last will and testament, in paragraph numbered eleven thereof, the said testatrix, Mayme Young, nominated,

*Page numbering appearing at the foot of page of original certified Transcript of Record.

constituted and appointed Alsie Young as Guardian of each of said children aforesaid, to wit, George Houston Cook and Ruth Marion Cook; and that said last will and testament is now on file in the above entitled proceeding in the above entitled Court and the same is herein referred to and made a part of this petition the same as if incorporated herein.

IV.

That the said Alsie Young, nominated, constituted and appointed guardian of each of said children by the terms of said last will and testament in the last preceding paragraph mentioned, is the same person as your petitioner Alsie M. Young.

V.

That your petitioner, Alsie M. Young, hereby signifies his acceptance of the office of guardian of each of said children, George Houston Cook and Ruth Marion Cook, and accepts the said appointment, and desires that the amount of his bond as such guardian be designated by this Court.

WHEREFORE, said petitioner, Alsie M. Young, prays that this petition be allowed and respectfully requests this Honorable Court that the amount of his bond as Guardian for said minor children, George Houston Cook and Ruth Marion Cook, be fixed and determined by an order of this Court, and that, upon compliance by your petitioner with the terms of said order and the approval and acceptance of the said bond by this Honorable Court, Letters

of Guardianship issue to him under the hand and seal of said Court authorizing him to perform all the duties required by law as Guardian of said minor children aforesaid, and confirming his appointment as such Guardian under said Will of Mayme Helen Young, deceased.

And your petitioner will ever pray.

ALSIE M. YOUNG
By CECIL H. CLEGG
His Attorney. [2]

United States of America,
Territory of Alaska,
Fourth Judicial Division.—ss.

CECIL H. CLEGG, being first duly sworn, on oath deposes and says: That he is the attorney for Petitioner, Alsie M. Young, thereunto duly authorized; that he makes this verification as attorney for said Alsie M. Young for the reason that said Alsie M. Young is not present at the place where said verification is made; and that he has read the foregoing petition, knows the contents thereof, and the same is true as he verily believes, except as to those matters alleged upon information and belief, and as to those he believes the same to be true.

CECIL H. CLEGG

Subscribed and sworn to before me on this 12th day of October, 1934.

[Seal] LOUISE PARCHER
Notary Public in and for the Territory of Alaska, residing at Fairbanks, Alaska.

My Commission expires April 30, 1938.

[Endorsed]: Filed Oct. 12, 1934. [3]

[Title of Court and Cause.]

NOTICE

To JULIEN A. HURLEY, Attorney for C. W. Tibbitt, Executor;

To LOUIS K PRATT, attorney for Wilhelmina Sumi; and

To WILHELMINA SUMI:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED That I have, on this 12th day of October, 1934, filed in the above entitled Court in the above named proceeding a petition addressed to said Court requesting that the amount of my bond as Guardian under the will of Mayme Helen Young, the above named decedent, of her minor children, George Houston Cook and Ruth Marion Cook, be fixed and determined by the said Court, and that Letters of Guardianship issue to me upon compliance with the terms of the said order and the approval of the bond to be tendered by me as such Guardian under said will; and that the said Court has appointed as the hour and date for the hearing of said petition, Wednesday, the 17th day of October, 1934, at eleven o'clock A. M. of said day, at the Courtroom of the above entitled Court in the Federal Building in the Town of Fairbanks, Alaska, at which said hearing you, and each of you, may then and there be present if you so desire.

Dated at Fairbanks, Alaska, this 12th day of October, 1934.

ALSIE M. YOUNG
By CECIL H. CLEGG
His Attorney.

Service of the foregoing Notice of hearing is acknowledged this 12th day of October, 1934, by receipt of a copy thereof, together with a copy of the Order fixing time of hearing and a copy of the Petition of Testamentary Guardian for order fixing amount of bond.

JULIEN A. HURLEY G.
Attorney for C. W. Tibbitt, Executor.
LOUIS K. PRATT
By MURIEL ANDERSON
Attorney for Wilhelmina Sumi.

[Endorsed]: Filed Oct. 12, 1934. [4]

[Title of Court and Cause.]

MARSHALS RETURN OF NOTICE.

I, J. A. McDonald, United States Marshal, for the Territory of Alaska, Fourth Division, do hereby certify and return that I received a copy of Notice of Hearing with Petition of Testamentary Guardian for Order Fixing Amount of Bond, together with Order Fixing Time for Hearing Petition of Alsie M. Young to have amount of Guardian's Bond Fixed Under the Will, at Fairbanks, Alaska, on the 12th day of October, 1934, and that thereafter on the 12th day of October, 1934, I duly served the same by delivering the said Copy of Notice with Petition of Testamentary Guardian for Order Fixing Amount of Bond, together with Order Fixing Time for Hearing Petition of Alsie M.

Young to have amount of Guardian's Bond Fixed under the Will, to Mrs. Wilhelmina Sumi, personally and in person, at her residence in Fairbanks, Alaska.

Dated at Fairbanks, Alaska, this 13th day of October, 1934.

J. A. McDONALD
United States Marshal
By JOHN J. BUCKLEY
Deputy

Marshals Fees: $3.00.

[Endorsed]: Filed Oct. 13, 1934. [5]

[Title of Court and Cause.]

PROTEST AGAINST FIXING BOND OF ALSIE M. YOUNG AS GUARDIAN AND PETITION FOR APPOINTMENT OF GUARDIAN.

Comes now Wilhelmina Sumi, widow, and grandmother and next of kin to George Houston Cook and Ruth Marion Cook and protests against the petition of Alsie M. Young for an order fixing his bond as Guardian of the persons of the said children but not their estates, as the same appears on file herein, and she hereby petitions the court to appoint her as Guardian of the persons and estates of the said two minor children and as grounds therefor shows to the Court the following state of facts:

I.

That said petition of Alsie M. Young is entitled "In the Matter of the Estate of Mayme Helen Young, deceased," whereas the said petition has nothing whatever to do with the said estate but would be appropriate in a proceeding entitled "In the Matter of the Guardianship of George Houston Cook and Ruth Marion Cook, Minor Children of Mayme Helen Young, Deceased"; that on or about the 21st day of March, 1934, the said Mayme Helen Young, mother to the said minors, while suffering excruciating physical pain and under the influence of opiates, at her home in Fairbanks, Alaska, and in the absence of her mother the said Wilhelmina Sumi and her sisters and other relatives, did sign what purports to be her Last Will and Testament, wherein she did attempt to appoint "Alsie Young" Guardian of the said two minor children, but whether the said Alsie Young and Alsie M. Young, petitioner here is one and the same person this protestant has no means of knowing; that the said Alsie Young is a married man, living with his wife and their three children in Coleman, Michigan, has never even seen these minor children, George Houston and Ruth Marion Cook and has no interest in them other than such as may have been aroused in [6] his mind by knowledge of the fact that their said Mother in the said Will had left them a large amount of property, which according to the inventory returned by C. W. Tibbitt, Executor of the said Will, is of the amount and value of between $35,000.00 and $40,000.00, $13,000.00 and over of which was cash.

II.

That Wilhelmina Sumi, petitioner herein, has been a resident of Fairbanks, Alaska, for more than twenty-five (25) years last past and was and is the mother of children, one of whom Mayme Helen Sumi, was her daughter; that the said daughter married George Cook and during that relation three children were born to them, two of whom were and are said minor children, George Houston Cook, now aged ten years, and Ruth Marion Cook, now nine years old, her grandchildren; that for as much as four years of the lives of the said minors, they have lived with her, she furnishing them suitable food and clothing and attending to their schooling and for more than six months last past has had them in her exclusive custody and control at her home in Fairbanks, at Seventh Avenue and Noble Street; that in 1926 said George Cook died and afterward and in 1928 the said Mayme Helen Cook nee Mayme Helen Sumi was married to Edward Young, who met his death in an airplane accident September 20, 1933; that the said Mayme Helen Young, daughter of petitioner as aforesaid died May 4, 1934; that petitioner is much attached to the said minor children and they to her and she desires to be appointed Guardian of their presons and estates and is physically, mentally and financially qualified for such appointment.

WHEREFORE protestant and petitioner prays this Court for an Order, judgment and decree as follows: that the testamentary appointment by Will

of said Alsie Young be cancelled and revoked and that he be not allowed to qualify as Guardian of the said Minors and that she be appointed their Guardian and the amount of her bond fixed as such; for the costs and disbursements of this proceeding and for all other appropriate relief to which she may be entitled in equity.

LOUIS K. PRATT
Attorney for Protestant and
Petitioner. [7]

United States of America,
Territory of Alaska—ss.

WILHELMINA SUMI on oath says: I am the protestant and petitioner above named and have read the said Protest and Petition and am familiar with the allegations and statements therein contained and the same are true to the best of my knowledge and belief.

WILHELMINA SUMI

Dated at Fairbanks, Alaska, this 15th day of October, 1934.

[Seal] LOUIS K. PRATT,
Notary Public in and for the Territory of Alaska.

My commission expires June 25, 1936.

Service of the foregoing Protest and Petition is hereby acknowledged, by receipt of a copy thereof, this 15th day of October, 1934.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed Oct. 15, 1934. [8]

[Title of Court and Cause.]

ANSWER OF PETITIONER ALSIE M. YOUNG TO PROTEST FILED HEREIN BY WILHELMINA SUMI.

Comes now Alsie M. Young, petitioner herein, and, for answer to the Protest filed herein by Wilhelmina Sumi, admits, denies and alleges as follows, to wit:

I.

Denies all the allegations of paragraph numbered 1 of said Protest, except that Alsie M. Young is a married man, living with his wife and their children in Coleman, Michigan.

II.

Denies that portion of paragraph numbered II of said Protest reading as follows: "that for as much as four years of the lives of the said minors, they have lived with her, she furnishing them suitable food and clothing and attending to their schooling," and further denies that the said Wilhelmina Sumi is "physically, mentally and financially qualified" to be appointed guardian of the persons and estates of said children.

WHEREFORE, petitioner Alsie M. Young prays that said Protest be dismissed and that the prayer of his petition for order fixing amount of bond be granted.

CECIL H. CLEGG
Attorney for Petitioner,
Alsie M. Young. [9]

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

CECIL H. CLEGG, being first duly sworn, on oath deposes and says: That he is the attorney for Petitioner, Alsie M. Young, thereunto duly authorized; that he makes this verification as attorney for said Alsie M. Young for the reason that said Alsie M. Young is not present at the place where said verification is made; and that he has read the foregoing Answer to Protest, knows the contents thereof, and the same is true as he verily believes.

CECIL H. CLEGG.

Subscribed and sworn to before me on this 16th day of October, 1934.

[Seal] LOUISE PARCHER

Notary Public in and for the Territory of Alaska, residing at Fairbanks, Alaska. My commission expires April 30, 1938.

Service of the foregoing Answer, by receipt of a copy thereof, is acknowledged this 17th day of October, 1934.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi.

[Endorsed]: Filed Oct. 17, 1934. [10]

[Title of Court and Cause.]

MOTION TO DISMISS OR FOR A CONTINUANCE.

The Protestant and Petitioner herein, Wilhelmina Sumi, moves the Court for an order dismissing this matter for lack of jurisdiction, or if the Court will not enter such an order, then that the hearing of this matter be continued to and until October 25th, 1934, and as grounds for such requests, she shows to the Court the following:

I.

She moves the Court to dismiss this proceeding for the reason that it is without jurisdiction to entertain the same, in this, that it is entitled "In the Matter of the Estate of Mayme Helen Young, Deceased," a matter that is confined solely to the disposition of the property of Mayme Helen Young, Deceased, whereas the application of Alsie M. Young, on file herein, has to do with his qualifications as Guardian of the persons of two minor children, to wit: George Houston Cook and Ruth Marion Cook, a subject wholly disconnected from the settlement of the Estate of the said Mayme Helen Young.

II.

In the event the Court will not sustain the motion to dismiss as above requested, then she moves the Court for an order continuing the hearing thereof to and until the 25th day of October, 1934, and shows to the Court: That her attorney, Louis K.

Pratt, is attorney for the plaintiff in the case of Joe Mitchell vs. Beaver Dredging Company, No. 3624, now pending in the District Court at Fairbanks, the same involving approximately $3000.00 in money and a foreclosure of a mine *labor's* lien to secure the payment thereof, which said action was set for trial in the said Court for November 16, 1934, at ten o'clock A.M.: that at said time the defendant interposed a motion for a continuance, which said motion was set for hearing on October 17, 1934, at two o'clock P.M., and will [11] require the attendance of her said attorney in opposition to the said motion.

III.

That her daughter, Violet Winbauer, is an important and necessary witness in her behalf in the hearing of this matter, and if present could and would testify that she was at the home of Mayme Helen Young, her sister, before and after March 21, 1934, the day the said sister signed what purports to be her Last Will and Testament; that her said sister suffered intense physical pain both before and after the said day, unless when under the influence of opiates, which were administered to her at frequest intervals, and that on said day she was in no mental condition to make a will; that while she was in the house on said day, she had no knowledge that her sister, Mayme Helen Young was signing a will and only knew that she did after it had occurred; that the said Violet Winbauer lives and is personally present at Tacotna,

Alaska, or in that vicinity, and it would be impossible to get her here for a witness short of eight or ten days or her deposition in less than perhaps thirty days.

LOUIS K. PRATT
Attorney for Protestant and Petitioner.

United States of America,
Territory of Alaska—ss.

WILHELMINA SUMI, on oath says: That she is the Protestant and Petitioner named in the Protest and Petition filed by her herein; that she has read the foregoing motion and is familiar with the allegations and statements therein contained and the same are true to the best of her knowledge and belief.

WILHELMINA SUMI

Subscribed and sworn to before me this 16th day of October, 1934.

[Seal] LOUIS K. PRATT
Notary Public in and for the Territory of Alaska.

My commission expires June 25, 1936. [12]

Service of the foregoing Motion is hereby acknowledged, by receipt of a copy thereof, this 16th day of October, 1934.

CECIL H. CLEGG By L. P.
Attorney for Alsie M. Young.

[Endorsed]: Filed Oct. 16, 1934. [13]

[Title of Court and Cause.]

AMENDED PROTEST AGAINST FIXING BOND OF ALSIE M. YOUNG AS GUARDIAN AND PETITION FOR APPOINTMENT OF GUARDIAN.

Comes now Wilhelmina Sumi, widow, grandmother and next of kin to George Houston Cook and Ruth Marion Cook and protests against the petition of Alsie M. Young for an order fixing his bond as Guardian of the persons of the said children but not their estates, as the same appears on file herein, and she hereby petitions the Court to appoint her as Guardian of the persons and estates of the said two minor children and as grounds therefor shows to the Court the following state of facts:

I.

That said petition of Alsie M. Young is entitled "In the Matter of the Estate of Mayme Helen Young, Deceased," whereas the said petition has nothing whatever to do with the said estate but would be appropriate in a proceeding entitled "In the Matter of the Guardianship of George Houston Cook and Ruth Marion Cook, Minor Children of Mayme Helen Young, Deceased"; that on or about the 21st day of March, 1934, the said Mayme Helen Young, mother to the said minors, while suffering excruciating physical pain and under the influence of opiates, at her home in Fairbanks, Alaska, and in the absence of her mother the said Wilhelmina Sumi and her sisters and other relatives, did sign what

purports to be her Last Will and Testament, wherein she did attempt to appoint "Alsie Young" Guardian of the said two minor children, but whether the said Alsie Young and Alsie M. Young, petitioner herein is one and the same person this protestant has no means of knowing; that on May 7th, 1934, without any notice to the heirs and beneficiaries [14] under the will of said Mayme Helen Young, deceased, and without notice to or the knowledge or consent of this Protestant, then in the actual custody of said minors at her home in Fairbanks, this Court entered an order purporting to admit the said Will to Probate; that even if the said Will and the probate thereof were valid, yet the said Alsie Young failed for a period of more than five months after said supposed probate, to signify his acceptance of such testamentary appointment as Guardian of said Minors or qualify as such and thereby renounced such supposed testamentary appointment; that the said Alsie Young is a married man, living with his wife and their three children in Coleman, Michigan, has never even seen these minor children, George Houston and Ruth Marion Cook and has no interest in them other than such as may have been aroused in his mind by knowledge of the fact that their Mother in the said Will had left them a large amount of property, which, according to the inventory returned by C. W. Tibbitt, Executor of the said Will, is of the amount and value of $37,853.00, $13,153.86 of which was cash.

II.

That Wilhelmina Sumi, petitioner herein, has been a resident of Fairbanks, Alaska, for more than twenty-five (25) years last past and was and is the mother of children, one of whom Mayme Helen Sumi, was her daughter; that the said daughter married George Cook and during that relation three children were born to them, two of whom were and are said minor children, George Houston Cook, now aged ten years, and Ruth Marion Cook, now nine years old, her grandchildren; that for as much as four years of the lives of the said minors, they have lived with her, she furnishing them suitable food and clothing and attending to their schooling and for more than six months last past has had them in her exclusive custody and control at her home in Fairbanks, at Seventh Avenue and Noble Street; that in 1926 said George Cook died and afterward and in 1928 the said Mayme Helen Cook nee Mayme Helen Sumi was married to Edward Young, who met his death in an airplane accident September 20, 1933; that the said Mayme Helen Young, daughter of the Petitioner [15] as aforesaid, died May 4, 1934; that Petitioner is much attached to the said minor children and they to her and she desires to be appointed Guardian of their persons and estates and is physically, mentally and financially qualified for such appointment.

WHEREFORE Protestant and Petitioner prays this Court for an order, judgment and decree as follows: that the testamentary appointment by Will of

said Alsie Young be cancelled and revoked and that he be not allowed to qualify as Guardian of the said Minors and that she be appointed their Guardian and the amount of her bond fixed as such; for the costs and disbursements of this proceeding and for all other appropriate relief to which she may be entitled in equity.

LOUIS K. PRATT,
Attorney for Protestant and Petitioner.

United States of America,
Territory of Alaska—ss.

WILHELMINA SUMI on oath says: I am the Protestant and Petitioner above named and have read the said Amended Protest and Petition and am familiar with the allegations and statements therein contained and the same are true to the best of my knowledge and belief.

WILHELMINA SUMI,

Dated at Fairbanks, Alaska, this 20th day of October, 1934.

[Seal] LOUIS K. PRATT,
Notary Public in and for the Territory of Alaska.

My commission expires June 25, 1936.

Service of the foregoing Amended Protest and Petition is hereby acknowledged, by receipt of a copy thereof, this 20th day of October, 1934.

CECIL H. CLEGG,
Attorney for Alsie Young, By L. P.

[Endorsed]: Filed Oct. 20, 1934. [16]

[Title of Court and Cause.]

MOTION TO STRIKE AMENDED PROTEST.

Comes now Alsie M. Young, petitioner, and respectfully moves the Court to strike out the Amended Protest heretofore filed herein by Wilhelmina Sumi, Protestant and Petitioner, upon the following grounds, namely:

1. That no leave of Court was requested, had or obtained for the filing of the same.

2. That said amended protest was filed after the issues had already been made up and the cause set for hearing.

3. That the said amended protest, and the whole thereof, is irrevelant and immaterial.

CECIL H. CLEGG,
Attorney for Petitioner, Alsie M. Young.

Service of the foregoing motion, by receipt of a copy thereof, is acknowledged this 22nd day of October, 1934.

LOUIS K. PRATT,
Attorney for Wilhelmina Sumi.

[Endorsed]: Filed Oct. 20, 1934. [17]

In the Probate Court, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, at Fairbanks, Alaska.

No. 549.

In the Matter of the Estate of
MAYME HELEN YOUNG, Deceased.

ORDER AND JUDGMENT.

This matter coming on regularly to be heard before the above entitled Court on the 22nd day of October, 1934, at the hour of ten o'clock A. M. upon the petition of Alsie M. Young, testamentary guardian under the last will and testament of Mayme Helen Young, deceased, for an order of said Court fixing the amount of his bond as guardian of the minor children of said deceased, to-wit, George Houston Cook and Ruth Marion Cook, aged nine and eight years respectively, and for the issuance to him of letters of guardianship out of said Court, the said Alsie M. Young appearing by and through his attorney, Cecil H. Clegg, and Wilhelmina Sumi appearing in person and by and through her attorney, Louis K. Pratt, and Wilhelmina Sumi having appeared in said matter and filed a protest against said application of said Alsie M. Young and a petition for the appointment of herself as guardian of said minor children and further requesting the revocation of the testamentary appointment of the said Alsie M. Young as such guardian, to which said protest said Alsie M. Young filed an answer.

The protestant, Wilhelmina Sumi, moved the Court to dismiss the petition of Alsie M. Young for

an order fixing the amount of his bond as guardian on the ground that it was entitled "In the Matter of the Estate of Mayme Helen Young, deceased," which motion, after argument, was denied.

The petitioner, Alsie M. Young, moved the Court to strike the "Amended Protest against fixing Bond of Alsie M. Young as Guardian and Petition for Appointment as Guardian" filed by Wilhelmina Sumi upon the grounds that the same was filed without leave of Court after the issues had already been made up and the [18] case set for hearing and that the said Amended Protest, and the whole thereof, was irrelevant and immaterial, which motion, after argument of the respective counsel, the Court sustained.

Thereupon the said Court having considered the issues raised by the pleadings hereinbefore mentioned and having heard the attorneys for the respective parties in argument thereon, and having considered the law and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Court that the protest of Wilhelmina Sumi against the fixing of the bond of Alsie M. Young as guardian of said minor children, George Houston Cook and Ruth Marion Cook, and her petition for appointment as guardian in her own behalf, and also her petition requesting the Court to revoke and cancel the testamentary appointment of the said Alsie M. Young as guardian of said children be, and the same are hereby, in all things denied; and

It further appearing to the Court from the said hearing that the prayer of the petition of Alsie M. Young as testamentary guardian under the last will and testament of said decedent, Mayme Helen Young, for an order fixing the amount of his bond as such guardian should be granted; and

It further appearing to the said Court that the said Alsie M. Young is a resident and inhabitant of the town of Coleman, Michigan, and also of the State of Michigan; that he is a married man residing in said town and state with his wife and their three children; that the above named decedent, Mayme Helen Young, died testate in the town of Fairbanks, Alaska, on May 4th, 1934; that at the time of her death she was a resident and inhabitant of said town of Fairbanks, Alaska; that at the time of her death as aforesaid she left surviving her, amongst others, two minor children, to wit, George Houston Cook, aged nine years, and Ruth Marion Cook, aged eight years; that said minor children were and are the children of the said Mayme Helen Young and a former husband, George Cook, who died at Anchorage, Alaska, on or about May 28th, 1926; that the said George Cook, father of said minor children, had not, prior to his death, by last will or otherwise, appointed a guardian for either of said children; that each of said minor children is now [19] living in said town of Fairbanks, Alaska, in the possession of Wilhelmina Sumi; that prior to the death of the said Mayme Helen Young, mother of said minor children, and on March 21st, 1934, she did

make, execute, publish and declare her last will and testament in writing, which said last will and testament was on May 7th, 1934, duly admitted to probate in the above entitled Court and in the above entitled proceeding; that by the terms of said last will and testament, in paragraph numbered 11 thereof, the said testatrix, Mayme Helen Young, nominated, constituted and appointed Alsie Young as guardian of each of said minor children, to wit, George Houston Cook and Ruth Marion Cook, and that said last will and testament is now on file in the above entitled Court, of which this Court takes judicial notice; that the said Alsie Young nominated, constituted and appointed guardian of each of said children aforesaid by the terms of said last will and testament of Mayme Helen Young, deceased, is the same person as Alsie M. Young; that said Alsie M. Young has signified, in the manner required by law, his acceptance of the office of guardian of the persons of each of said minor children, to wit: George Houston Cook and Ruth Marion Cook, aged nine and eight years respectively, and has accepted said appointment and is desirous that the amount of his bonds as such guardian be designated by this Court as required by law; and that the said Alsie M. Young is a fit, proper and competent person to receive said appointment;

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by this Court that the testamentary appointment of said Alsie M. Young by the

terms of the last will and testament of the above named decedent, Mayme Helen Young, as guardian of the person of each of her minor children, George Houston Cook and Ruth Marion Cook, aged nine and eight years respectively, be, and the same is hereby, in all things confirmed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the bond of said Alsie M. Young as guardian of the person of each of said minor children of said Mayme Helen Young, deceased, to wit, George Houston Cook and Ruth Marion Cook, aged nine and eight years respectively, be, and the same is hereby, fixed and [20] determined in the sum of Three Thousand Dollars ($3,000.00); and

IT IS FURTHER ORDERED by this Court that, upon the filing of a bond in said sum heretofore mentioned, with sufficient surety or sureties, by the said Alsie M. Young as such guardian and the approval thereof by the Commissioner and ex officio Probate Judge of the Fairbanks Precinct, Territory of Alaska, and upon his filing his Oath of Office, Letters of Guardianship issue to him as such guardian under the hand and seal of said Court authorizing him to do and perform all of the duties required of him by law as guardian of the person of each of said minor children aforesaid during the minority of each of them.

DONE IN OPEN COURT at Fairbanks, Alaska, this 26 day of October, 1934.

[Seal] GEO. W. ALBRECHT

United States Commissioner and ex-officio Probate Judge, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska.

[Endorsed]: Filed Oct. 26, 1934. [21]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Alsie M. Young or Cecil H. Clegg, his attorney:

Wilhelmina Sumi, Grandmother, next of kin and in the actual custody of the minor children, George Houston Cook and Ruth Marion Cook, the subjects of this proceeding, hereby gives notice that she has and does hereby appeal to the District Court for the Territory of Alaska, Fourth Judicial Division, sitting at Fairbanks, from the order and judgment of said Probate Court and the whole thereof, dated October 26th, 1934, wherein said Probate Court approved and confirmed the testamentary appointment of Alsie M. Young, of Coleman, Michigan, as Guardian of said minors, fixed the amount of his bond and ordered that on filing and approval of such bond with oath of office, Letters of Guardianship should issue to him authorizing him to act as Guardian of the persons of said minors but not their property, also refusing to revoke the testamentary appointment of Alsie Young as Guardian

of said children and appoint her as such Guardian as prayed for in the Protest and Petition filed by her in said proceeding.

Dated at Fairbanks, Alaska, this 30th day of October, 1934.

WILHELMINA SUMI
Appellant.

Received a copy of the foregoing notice of appeal and the exceptions thereto attached, this 30th day of October, 1934.

CECIL H. CLEGG
Attorney for Alsie M. Young. [22]

[Title of Court and Cause.]

EXCEPTIONS TO ORDER AND JUDGMENT.

Wilhelmina Sumi, Grandmother, next of kin and in the actual custody of the two minors, George Houston Cook and Ruth Marion Cook, the subjects of these proceedings, excepts to the order and Judgment of said Probate Court of date October 26th, 1934, in connection with her appeal and notice thereon, on the following grounds:

1. She excepts to the action of said Probate Court in overruling her motion to dismiss the proceeding for lack of jurisdiction to entertain the same, in that it was entitled "In the Matter of the Estate of Mayme Helen Young, deceased," whereas it should have been entitled "In the Matter of the Guardianship of George Houston Cook and Ruth

Marion Cook, minor children of Mayme Helen Young, deceased," the Estate Matter having nothing whatever to do with the Guardianship of the said minors.

2. She excepts to the order of said Probate Court sustaining the motion of Alsie M. Young to strike from the files her Amended Protest and Petition and striking the same from the files.

3. She excepts to the findings of fact contained in said Order and Judgment, to wit: "that Alsie M. Young resides with his wife and their three children at Coleman, Michigan," "that George Cook had not by will appointed a Guardian for said minors George Houston Cook and Ruth Marion Cook," "that Alsie Young and Alsie M. Young is one and the same person," "that Alsie M. Young was and is a proper and competent person to act as Guardian of said minors," which findings are a substantial part of the predicate of said Order and Judgment, for the reason that at the hearing on [23] October 22nd, 1934, there was not a scintilla of evidence heard or taken in support of the Petition of said Alsie M. Young alleging such facts.

4. She excepts to the action of said Probate Court in denying her the right to produce evidence in proof of the allegations contained in her Protest and Petition as on file and in denying the prayer thereof.

5. She excepts to said Order and Judgment as a whole, for the reason that it was signed and entered of record in said Probate Court

without the taking or hearing of any evidence whatever, either in proof of the allegations of the Petition of said Alsie M. Young or her Protest and Petition for appointment as Guardian of the said minors George Houston and Ruth Marion Cook and approves and confirms the testamentary appointment of Alsie M. Young as Guardian of the persons of said minors but not of their estates, whereas Chap. 88, Compiled Laws of Alaska authorized the appointment of Guardians for both the persons and estates of minors but not of the persons alone or the estates alone; she further excepts to the said Order and Judgment wherein it fixes the bond of said Alsie M. Young as Guardian and directs the issuance of Letters of Guardianship to him, for lack of jurisdiction to make such order and to the refusal therein to revoke the testamentary appointment of Alsie Young as Guardian of said minors and appoint her such Guardian.

WHEREFORE Appellant prays for the Order and Judgment of the appellate court, directing said Probate Court to revoke the testamentary appointment of Alsie Young or Alsie M. Young as Guardian of said minors and to cancel and annul its order fixing the amount of Guardian's Bond to be filed by said Alsie M. Young and directing the issuance to him of Letters of Guardianship; also awarding her a hearing on her equitable counterclaim embodied in her Protest and Petition for appointment as Guardian of said minor children and for the costs and disbursements of this Appeal, including an attorney's fee for her attorney and all other appropriate relief. [24]

Dated at Fairbanks, Alaska, this 30th day of October, 1934.

WILHELMINA SUMI
Appellant.

Service of the foregoing Exceptions to Order and Judgment is hereby acknowledged, by receipt of a copy thereof, this 30th day of October, 1934.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed Oct. 30, 1934. [25]

[Title of Court and Cause.]

CERTIFICATE.

United States of America,
Territory of Alaska,
Fairbanks Precinct.—ss.

I, Geo. W. Albrecht, Commissioner and Ex-Officio Probate Judge in and for the Fairbanks Precinct, Fourth Division, Territory of Alaska, do hereby certify that the annexed and foregoing is a true copy of the Petition of Testamentary Guardian for Order Fixing Amount of Bond; Notice and Marshals Return on Notice; Protest against Fixing Bond of Alsie M. Young as Guardian and Petition for Appointment as Guardian; Answer of Petitioner Alsie M. Young to Protest Filed herein by Wilhelmina Sumi; Motion to Dismiss or for a Continuance; Amended Protest Against Fixing Bond

of Alsie M. Young as Guardian and Petition for Appointment as Guardian; Motion to Strike Amended Protest; Order and Judgment; Notice of Appeal and Exceptions to Order and Judgment:—in the above entitled matter, as the same now appear on file and of record in my office.

WITNESS my hand and the seal of the Probate Court of the Precinct and Territory aforesaid, on this, the 2nd day of November, 1934.

[Seal] GEO. W. ALBRECHT
Commissioner and Ex-Officio
Probate Judge.

[Endorsed]: No. 3806. Filed in the District Court, Territory of Alaska, 4th Div., No. 3, 1934. N. H. Castle, Clerk, by E. A. Tonseth, Deputy. [26]

[Title of Court and Cause.]

MOTION TO SET CASE FOR HEARING.

Upon the request of Mr. Louis K. Pratt, attorney for appellant that case be now set for hearing, Mr. Cecil H. Clegg, attorney for Alsie M. Young, Guardian and appellee, objecting and stating that a motion to dismiss the appeal would be interposed, ORDERED that matter be set over to Friday, November 9th to follow Law and Motion Calendar.

Nov. 7. 1934. Entered in Court Journal No. 19, Page 203. [27]

In the District Court, Territory of Alaska, Fourth Judicial Division.

No. 3806

In the Matter of the Estate of

MAYME HELEN YOUNG, Deceased.

MOTION TO DISMISS APPEAL.

Comes now Alsie M. Young, Guardian of the person of George Houston Cook and Ruth Marion Cook, minor children of Mayme Helen Young, deceased, and respectfully moves this Honorable Court to dismiss the appeal filed herein in behalf of Wilhelmina Sumi upon the grounds and for the reasons:

1. That no proper transcript of all the files, papers and evidence pertaining to the order sought to be appealed from has been filed by the appellant, Wilhelmina Sumi, with the Clerk of the District Court in that:

(a) No transcript of the bond of said guardian required to be filed in said Probate Court has been included in said transcript now on file in this Court.

(b) No transcript or copy of the order of said Probate Court approving said bond has been filed as part of the transcript now on file in this Court.

(c) No transcript or copy of the Oath of Office of said Guardian filed in said Probate

Court is included in the transcript of said proceedings filed in this Court.

2. That this Court has no jurisdiction to entertain said appeal for the reason that said Wilhelmina Sumi, appellant, was not a party to the proceedings in said Probate Court and she is, therefore, not authorized under the law to appeal from the said order of the said Probate Court fixing the bond of said guardian, and for the further reason that said Wilhelmina Sumi was not interested in the subject matter of the said proceedings before the said Probate Court and does not claim to be aggrieved by the decision therein rendered. [28]

3. That no notice of hearing of said appeal requiring said guardian to appear in the District Court within twenty days from the date of service of said notice has been served upon the said guardian by the said Wilhelmina Sumi, appellant, as required by Rule 34 of the Rules of this Court, and no notice as required by said Rule 34 with acceptance and proof of service on said guardian has been filed in the said proceedings in this Court.

WHEREFORE, said Guardian prays that said appeal be dismissed and that he have his costs and disbursements together with the statutory attorney's fee provided by law.

CECIL H. CLEGG
Attorney for Alsie M. Young,
Guardian.

Service of the foregoing Motion to Dismiss, by receipt of a copy thereof, is acknowledged this 7th day of October, 1934.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi, Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 7, 1934. N. H. Castle, Clerk, by E. A. Tonseth, Deputy. [29]

[Title of Court and Cause.]

HEARING ON MOTION TO DISMISS APPEAL.

This matter coming on regularly for hearing at this time, request was made to the Court by Cecil H. Clegg, Esq., representing moving party, that he be permitted to file amended motion to rectify title of Court and so ordered.

Motion to dismiss appeal was then argued by Mr. Clegg, replied to by Mr. Louis K. Pratt, representing appellant and argument closed by Mr. Clegg. Whereupon the matter was submitted and taken under advisement by the Court.

Nov. 9, 1934. Entered in Court Journal No. 19, Page 205. [30]

[Title of Court and Cause.]

ORDER DENYING MOTION TO DISMISS APPEAL.

Now on this day, this matter having heretofore and on November 9, 1934, come on regularly for hearing on motion to dismiss appeal, and the Court being now duly advised in the premises,

IT IS ORDERED that the said motion to dismiss appeal be, and it is hereby denied. (Clerk's note: To which Appellee excepts and exception is allowed.)

Court declared recess until 11:00 A.M.

Nov. 21, 1934. Entered in Court Journal No. 19, Page 226. [31]

[Title of Court and Cause.]

ORDER SETTING MATTER FOR TRIAL.

Upon the oral motion of Louis K. Pratt, Esq., Attorney for appellant and upon his statement in open Court that counsel for the respective parties, appellant and appellee, were agreed, trial of this case was set for 10:00 A.M. of Wednesday, January 2nd, 1935.

Dec. 20, 1934. Entered in Court Journal No. 19, Page 261. [32]

[Title of Court and Cause.]

TRIAL BY COURT.

Statement made by Louis K. Pratt, Esq., representing the appellant Wilhelmina Sumi followed by statement by Hon. Cecil H. Clegg, representing appellee.

Wilhelmina Sumi sworn for appellant and examined by Mr. Pratt and cross-examined by Mr. Clegg.

Note: this evidence taken under objection by Mr. Clegg which objection was overruled and exception taken and allowed.

Andrew Nerland sworn as witness for appellant; examined by Mr. Pratt; no cross.

John E. Youell sworn as a witness for appellant, examined by Mr. Pratt; no cross.

Mrs. Louise Van Bibber and Mrs. Agnes Herring sworn as witnesses for appellant and examined by Mr. Pratt; no cross.

Thereupon appellant rested her case.

William J. Campbell, sworn as witness for appellee; examined by Mr. Clegg and cross examined by Mr. Pratt.

Mrs. Mamie Tibbetts sworn as witness for appellee; examination by Mr. Clegg, and, under objection interposed by Mr. Pratt, witness withdrawn.

Depositions of Alsie M. Young read by Mr. Clegg in behalf of appellee.

After noon adjournment case was continued and the reading of the deposition of Alsie M. Young

was continued; the cross interrogatories were read by Mr. Pratt.

Adjournments were had to secure the presence of Mr. Jos. Crosson who, on appearing was sworn as witness for appellee, examined by Mr. Clegg and cross examined by Mr. Pratt.

Appellee thereupon rested and appellant offering no rebuttal the case proceeded to argument and was thereupon argued by Messrs. Pratt and Clegg for appellant and appellee respectively and argument was continued to 2:00 P.M. of Thursday, January 3d, 1935.

Jan. 2, 1935. Entered in Court Journal No. 19, Page 269. [33]

[Title of Court and Cause.]

TRIAL BY COURT. (continued)

Trial of above entitled cause continued; closing argument by Mr. Louis K. Pratt for appellant, whereupon the case was submitted and taken under advisement by the court.

Jan. 3, 1935. Entered in Court Journal No. 19, Page 269. [34]

[Title of Court and Cause.]

ORDER SUSTAINING JUDGMENT OF COMMISSIONER.

This matter having been heretofore tried before the Court, Hon. K. Pratt representing the appel-

lant Wilhelmina Sumi and Hon. Cecil H. Clegg representing Alsie M. Young and the Court having taken the matter under advisement and being fully advised in the premises, ORDERED that the judgment and Order of the Commissioner be and the same is hereby sustained and the said Alsie M. Young be and he is appointed Guardian of the minor children George Houston Cook and Ruth Marion Cook. On motion of Mr. Pratt he was granted sixty days in which to prepare and file a Bill of Exceptions.

Apr. 16, 1935. Entered in Court Journal No. 19, page 333. [35]

[Title of Court and Cause.]

ORDER SETTING OBJECTIONS TO PROPOSED FINDINGS FOR HEARING.

This matter coming on regularly for hearing at this time, was, on motion of Cecil H. Clegg, Esq., attorney for Alsie Young, set for hearing for Wednesday, May 15th, at 2:00 P. M. subject, however, to the right of Mr. Louis K. Pratt, the attorney for Wilhelmina Sumi, to a further continuance if required.

May 10, 1935. Entered in Court Journal No. 19, page 351. [36]

[Title of Court and Cause.]

HEARING ON OBJECTIONS TO PROPOSED FINDINGS OF FACT, ETC.

Now at this time this matter came on regularly for hearing on the objections to the proposed findings of fact and conclusions of law, Cecil H. Clegg, Esq., appearing for and on behalf of Alsie Young, and Louis K. Pratt, Esq., representing Wilhelmina Sumi.

Argument to the Court was had by respective counsel, whereupon the Court announced that the matter would be taken under advisement and decision rendered at a subsequent date.

May 15, 1935. Entered in Court Journal No. 19, page 357. [37]

[Title of Court and Cause.]

RULING ON FINDINGS AS REQUESTED BY APPELLANT AND APPELLEE.

The Court at this time signed Findings of Fact and Conclusions of Law with certain modifications to same as presented and overruled the objections to and the proposed amendments by appellant; to which ruling the appellant Wilhelmina Sumi excepted and to the Findings as signed, which exception was duly noted and allowed.

May 31, 1935. Entered in Court Journal No. 19, page 371. [38]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

BE IT REMEMBERED That on the 2nd day of January, 1935, said day being one of the regular Court days of the General January, 1934, term of the above entitled Court, there came on regularly to be heard the appeal and exceptions of Wilhelmina Sumi from the order and judgment made and entered by the Honorable George W. Albrecht, Commissioner and ex officio Probate Judge of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, sitting as such, on the 26th day of October, 1934; that said order was made upon the petition of Alsie M. Young, testamentary guardian under the terms of the last will and testament of Mayme Helen Young, deceased, of her minor children, George Houston Cook, age nine years, and Ruth Marion Cook, age eight years, asking that his bond as such testamentary guardian be fixed by said Probate Court and that Letters of Guardianship issue to him by reason of said testamentary appointment, to which said petition said Wilhelmina Sumi had filed a protest requesting said Probate Court to cancel and revoke the testamentary appointment of said Alsie M. Young as such guardian and that he be not allowed to qualify by furnishing the bond required by statute and in the amount determined by said Probate Court; and said Court having examined the transcript of said proceedings upon said

hearing before said Probate Court now on file herein, and having examined the records of said Probate Court in the above entitled proceeding and having taken, heard and considered certain oral testimony on behalf of said appellant, Wilhelmina Sumi, and in behalf of Alsie M. Young, guardian aforesaid, the respective parties being represented herein by Louis K. Pratt, as attorney for said Wilhelmina Sumi, and by Cecil H. Clegg, as attorney for Alsie M. Young, guardian aforesaid, this Court, being fully advised in the premises, does now make and enter herein the following

FINDINGS OF FACT [39]

I.

That Mayme Helen Young, prior to the 4th day of May, 1934, was a resident and inhabitant of the town of Fairbanks, Fourth Judicial Division, Territory of Alaska; that she died on said day in said town of Fairbanks; that at the time of her death she was the widow of George Edward Young, who died on September 20th, 1933; that she left surviving her, amongst others, two minor children, to wit, George Houston Cook, age nine years, and Ruth Marion Cook, age eight years, who were and are the children of said Mayme Helen Young and a former husband, George Cook; that said George Cook died at Anchorage, Alaska, on or about the 28th day of May, 1926, and that he had not, by last will and testament or otherwise, appointed a guardian for either of said children; and that each of said

minor children is now, and was at the date of said hearing in said Probate Court, living in the town of Fairbanks, Alaska, in the possession and custody of their grandmother, Wilhelmina Sumi, appellant herein.

II.

That prior to her death said Mayme Helen Young did, on March 21st 1934, make, execute, publish and declare her last will and testament in writing, which said last will and testament was, on the 7th day of May, 1934, duly admitted to probate in the Probate Court, Fairbanks Precinct, Fourth Division, Alaska; that by the terms thereof the said testatrix, Mayme Helen Young, nominated, constituted and appointed Alsie Young as Guardian of said minor children, George Houston Cook and Ruth Marion Cook, and nominated, constituted and appointed James M. Young as Trustee of all the real and personal property of her estate, with the exception of certain minor bequests, for the use and benefit, amongst others, of said George Houston Cook and Ruth Marion Cook, minor children involved in this proceeding. [40]

III.

That said Alsie Young, nominated and appointed guardian of each of said children aforesaid by said last will and testament, is the same person named as Alsie M. Young.

IV.

That said Alsie M. Young, by his said petition to the said Probate Court aforesaid, signified his ac-

ceptance of his appointment as guardian under the terms of the will of said Mayme Helen Young hereinabove mentioned, and requested said Probate Court for the Fairbanks Precinct, Fourth Division, Alaska, to designate the amount of his bond as such guardian and prayed that, upon compliance by him with the order of said Probate Court aforesaid fixing the amount of his bond as such guardian and its approval and acceptance by said Probate Court, Letters of Guardianship issue to him as such guardian under the hand and seal of said Probate Court.

V.

That said Probate Court did, by order duly made and entered on the 26th day of October, 1934, fix and determine the amount of bond of said Alsie M. Young as such guardian aforesaid in the sum of $3,000.00, and confirmed his appointment as such guardian under said will of Mayme Helen Young, deceased; that thereafter said Probate Court did issue to the said Alsie M. Young Letters of Guardianship authorizing him to perform all the duties required by law as guardian of the person of each of said minor children aforesaid; and that said Alsie M. Young is in all respects a fit, proper and competent person to act as such guardian and, as such guardian, he is entitled to the immediate and exclusive possession, custody and control of each of said minor children, George Houston Cook and Ruth Marion Cook.

VI.

That each and all of the exceptions taken, made and filed by the appellant, Wilhelmina Sumi, aforesaid to the order of said Probate Court is and are without merit in point of fact.

Dated at Fairbanks, Alaska, this 31st day of May, 1935. [41]

E. COKE HILL
District Judge.

And from the foregoing Findings of Fact, this Court does now make and enter herein the following

CONCLUSIONS OF LAW

I.

That the order and judgment of the Probate Court, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, made and entered in the above entitled proceeding on the 26th day of October, 1934, fixing and determining the amount of the bond of Alsie M. Young as guardian of the persons of George Houston Cook and Ruth Marion Cook, minor children of Mayme Helen Young, deceased, at the sum of $3,000.00 and confirming his appointment as such guardian under the will and testament of said Mayme Helen Young, deceased, and authorizing the issuance to said Alsie M. Young of Letters of Guardianship of the person of each of said children; was regular, valid and legal in all respects and was entirely within the jurisdiction of said Probate Court issuing the same; and that the ex-

ceptions of the appellant, Wilhelmina Sumi, filed herein should be denied and disallowed.

Dated at Fairbanks, Alaska, this 31st day of May, 1935.

E. COKE HILL
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 31, 1935. N. H. Castle, Clerk.

Entered in Court Journal No. 19, page 371. [42]

[Title of Court and Cause.]

OBJECTIONS TO AND AMENDMENTS OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Protestant and Petitioner, Wilhelmina Sumi, objects to the proposed Findings of Fact and Conclusions of Law as contained in the draft prepared and lodged in this Court by the attorney for Alsie M. Young, as follows:

I.

She objects to findings IV, V, and VI found on pages 3 and 4 of the proposed Findings and Conclusions, upon the ground that there was no sufficient evidence to warrant any such findings.

II.

She submits a proposed draft as a substitute for the findings under Roman Numerals IV and V above mentioned as follows:

IV.

That the will of Mayme Helen Young was admitted to Probate May 7, 1934, and thereafter and on Aug. 7, 1934, Joe Crosson was appointed by said Probate Court Guardian of said minors with the knowledge, acquiescence and approval of Alsie M. Young, said Crosson being represented by Cecil H. Clegg as his attorney, who is now representing said Alsie M. Young in this Matter; that afterwards the appointment of said Crosson was annulled in Appellate proceedings in this Court and on October 12, 1934, five months and five days after said will had been admitted to Probate, said Alsie M. Young attempted to accept such testamentary nomination and at his request said Probate Court fixed the amount of his bond as Guardian of their persons but not their estates at $3000.00; that while a document in the form of a Guardian's bond appears among the papers in the office of the Probate Judge, it was not signed by Alsie M. Young in person but was signed for him by Cecil H. Clegg as his attorney and [43] there is no justification by or for the Surety Company attached to or accompanying the same as required by Sec. 3089, C. L. A. (1933).

V.

That said minors were both born in Alaska and have lived all their lives therein and from birth till the death of their Mother May 4, 1934, that is for a period of between three and four years, were under the care of and lived with their Grandmother, Wilhelmina Sumi, at her home at 7th Ave and Noble St., in the town of Fairbanks, and have lived with

her continuously since the death of their mother and by reason of consanguinity and association said Grandmother is much attached to them and they to her and said children do not want to be taken from her and sent to a foreign State to live among strangers. I find that the interests of said minors would be best served by leaving them to the care and in the custody of their said Grandmother.

She also proposes as a substitute for the conclusions of law found in the said draft the following:

CONCLUSIONS OF LAW.

That the said Alsie M. Young, by his laches and acquiescence in the appointment of Joe Crosson as guardian, renounced and waived any rights he may have had under the testamentary appointment of guardian as contained in the will of Mayme Helen Young, and the best interest of the said two minor children George Houston and Ruth Marion Cook, require that they be left with their Grandmother and that she be appointed guardian of their persons and estates.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi.

Service of the foregoing Objections to and Amendments of Proposed Findings of Fact and Conclusions of Law, by receipt of a copy thereof, is hereby acknowledged this 22nd day of April, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Lodged Apr. 22, 1935. N. H. Castle, Clerk, by E. A. Tonseth, Deputy. [44]

[Title of Court and Cause.]

MOTION TO SET ASIDE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND GRANT A NEW TRIAL.

Comes now Wilhelmina Sumi and moves the Court for an order setting aside and annulling its decision as embodied in the Findings of Fact and Conclusions of Law on this Appeal, made and filed in this Court May 31, 1934, upon the following grounds:

1. For the reason that Finding of Fact No. 1, found at page 2 thereof was not sustained in part by any evidence whatever, that is to say, that the statement made therein, to wit: "that said George Cook died at Anchorage, Alaska, on or about the 28th day of May, 1926, and that he had not by last will or testament or otherwise, appointed a guardian for either of said children" was not supported by any evidence whatever and was an important and material part of the said finding;

2. That finding of fact No. 2 was not supported by any evidence whatever in this, that the following details stated therein, to wit: "that prior to her death said Mayme Helen Young did, on March 21, 1934, make, execute, publish and declare her last will and testament in writing, said last will and testament was on the 7th day of May, 1934, duly admitted to probate in the Probate Court, Fairbanks Precinct, Fourth Division, Territory of Alaska," and the further statement made therein, "and nominated, constituted, and appointed James M. Young

as trustee of all the real and personal property of her estate" was not supported by any evidence, nor was the will of Mayme Helen Young produced in evidence, although the said Wilhelmina Sumi in her protest and petition had admitted that Mayme Helen Young had made what purported to be a will on March 21, 1934, and had nominated Alsie M. Young as guardian; [45]

3. That Paragraph 5 of the said Finding of Fact found at pages 3 and 4 was not backed by any sufficient evidence and limits the guardianship to the persons of the said minor children and denies to the said Alsie M. Young the custody and management of their estates, makes no reference to the qualification of the said Wilhelmina Sumi to act as guardian for the said children and fails to state that the best interest of the said minors, George Houston and Ruth Marion Cook would be best served by the appointment of Alsie M. Young as their guardian rather than Wilhelmina Sumi;

4. Because the Conclusions of Law found in the said decision commencing at page 4 are not based upon any sufficient evidence to warrant the same, in the following respects; it confirms the appointment of Alsie M. Young as guardian of the persons of the said children but not their property in contravention of Sections 4513, 4513, 4515, 4516, Compiled Laws of Alaska (1933) without any finding of fact that the best interests of the said minors required the appointment of the said Alsie M.

Young as guardian of the persons of the said George Huston and Ruth Marion Cook rather than their grandmother, Wilhelmina Sumi.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi.

Received a copy of the foregoing motion this 3rd day of June, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 3, 1935. N. H. Castle, Clerk. [46]

[Title of Court and Cause.]

ARGUMENT ON MOTION TO SET ASIDE FINDINGS AND FOR NEW TRIAL.

This matter coming on regularly to be heard at this time upon the motion of Louis K. Pratt, Esq., attorney for Wilhelmina Sumi to set aside the Findings and for a New Trial, argument was had by Mr. Pratt in support of said motions, replied to by Cecil H. Clegg, Esq., representing Alsie M. Young, Guardian and argument closed by Mr. Pratt, whereupon the motions were submitted for the consideration of the Court and taken under advisement.

Jun. 7, 1935. Entered in Court Journal No. 19, page 381. [47]

In the District Court for the Territory of Alaska, Fourth Division.

No. 3806.

In the Matter of the Estate of
MAYME HELEN YOUNG, Deceased.

ORDER AND JUDGMENT.

BE IT REMEMBERED that on the 2nd day of January, 1935, said day being one of the regular Court days of the General January, 1934, term of the above entitled Court, there came on regularly to be heard the appeal and exceptions of Wilhelmina Sumi from the order and judgment made and entered by the Honorable George W. Albrecht, Commissioner and ex officio Probate Judge of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, sitting as such, on the 26th day of October, 1934; that said order was made upon the petition of Alsie M. Young, testamentary guardian under the terms of the last will and testament of Mayme Helen Young, deceased, of her minor children, George Houston Cook, age nine years, and Ruth Marion Cook, age eight years, asking that his bond as such testamentary guardian be fixed by said Probate Court and that Letters of Guardianship issue to him by reason of said testamentary appointment, to which said petition said Wilhelmina Sumi had filed a protest requesting said Probate Court to cancel and revoke the testamentary appointment of said Alsie M. Young as such guardian and that he be not allowed to qualify by furnishing the bond

required by statute and in the amount determined by said Probate Court; and said Court having examined the transcript of said proceedings upon said hearing before said Probate Court now on file herein, and having examined the records of said Probate Court in the above entitled proceeding and having taken, heard and considered certain oral testimony on behalf of said appellant, Wilhelmina Sumi, and in behalf of Alsie M. Young, guardian aforesaid, the respective parties being represented herein by Louis K. Pratt, as attorney for said Wilhelmina Sumi, and by Cecil H. Clegg, as attorney for Alsie M. Young, guardian aforesaid, and the Court having taken said matter under advisement to and until the 16th [48] day of April, 1935, and having then orally announced its decision denying said exceptions and each of them, and having made and entered herein its Findings of Fact and Conclusions of Law, and having heard and considered the Motion of the appellant, Wilhelmina Sumi, "to set aside Findings of Fact and Conclusions of Law and grant a new trial" and having denied the same, and being fully advised in the premises,

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED That the order and judgment of the Probate Court, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, made and entered on the 26th day of October, 1934, in the above entitled matter fixing the amount of bond of Alsie M. Young as guardian of the persons of George Houston Cook, age nine

years, and Ruth Marion Cook, age eight years, and authorizing the issuance of Letters of Guardianship to said Alsie M. Young, and confirming his appointment as such guardian under the last will and testament of Mayme Helen Young, deceased, be, and the same is, in all things hereby confirmed and approved.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED That each and all of the exceptions of appellant, Wilhelmina Sumi, to said order and judgment of said Probate Court be, and the same is and are hereby, denied and disallowed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the Clerk of this Court be, and he is hereby, directed to forward to the Honorable George W. Albrecht, Commissioner and ex officio Probate Judge for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, a copy of this order and judgment; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the costs of this appeal to be taxed by the Clerk of this Court to the amount of $88.35 be paid by the said appellant, Wilhelmina Sumi.

DONE AND ORDERED ENTERED at Fairbanks, Alaska, this 14th day of June, 1935.

E. COKE HILL,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 14, 1935. N. H. Castle, Clerk.

Entered in Court Journal No. 19, page 391. [49]

[Title of Court and Cause.]

MINUTE ORDER EXTENDING TIME TO SERVE BILL OF EXCEPTIONS.

On oral motion of Louis K. Pratt, Esq., attorney for Wilhelmina Sumi, the appellant in the above entitled cause, ORDERED that he have sixty (60) days from the date hereof in which to prepare, serve and file a Bill of Exceptions herein.

Jun. 14, 1935. Entered in Court Journal No. 19, page 391. [50]

[Title of Court and Cause.]

ORDER.

On motion of Wilhelmina Sumi, by and through Louis K. Pratt, her attorney,

IT IS ORDERED that execution of the Order and Judgment herein of date June 14, 1935, be, and the same is hereby stayed until and including Monday, June 17, 1935, and in the meantime no process of any kind shall be issued thereon.

Dated at Fairbanks, Alaska, this 15th day of June, 1935.

E. COKE HILL,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 15, 1935. N. H. Castle, Clerk, by E. A. Tonseth, Deputy.

Entered in Court Journal No. 19, page 393. [51]

[Title of Court and Cause.]

ORDER OF STAY AND SETTING ARGUMENT ON OBJECTIONS TO APPEAL.

Cecil H. Clegg, Esq., attorney for Alsie M. Young, Guardian, interposed oral objections to the allowance of the appeal by Louis K. Pratt, Esq., attorney for Wilhelmina Sumi; Mr. Pratt requesting further stay, ORDERED that the argument on the objections be had at 4 P.M. of Tuesday, June 18th and that stay be granted until after the disposition of said motion.

Jun. 17, 1935. Entered in Court Journal No. 19, Page 393. [52]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Wilhelmina Sumi, petitioner herein for appointment as Guardian of two of deceased's children, considering herself aggrieved by the order and judgment of this Court, made and entered in the above entitled action of the 14th day of June, A. D. 1935, and does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified and set forth in the Assignment of Errors which is filed herewith, and the said Wilhelmina Sumi prays that this appeal may be allowed and that a Citation may be issued accordingly to Alsie M. Young, petitioner herein for ap-

pointment as Guardian of said two children and that a transcript of the record and papers upon which the said order and judgment was made, duly authenticated by the Clerk of this Court, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Plaintiff further prays that this Court fix the amount of a Cost Bond to be approved by this Court, and filed herein by the appellant upon said Appeal.

Dated, Fairbanks, Alaska, June 14th, 1935.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi.

Due service of the foregoing petition for appeal and a copy thereof is hereby acknowledged, this 15th day of June, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 18, 1935. N. H. Castle, Clerk, by E. A. Tonseth, Deputy. [53]

[Title of Court and Cause.]

HEARING ON MOTION TO DISMISS APPEAL.

This matter came on regularly for hearing on the objections interposed by appellee to the granting of an appeal from the judgment dated June 14,

1935, and was argued by Cecil H. Clegg, Esq., representing the appellee Alsie M. Young, guardian, and Louis K. Pratt, Esq., representing Wilhelmina Sumi, the appellant, whereupon, at the close of said argument, the Court being fully advised, overruled said objections, to which ruling an exception was taken by Mr. Clegg and allowed. The Court thereupon signed the various orders with respect to said appeal.

Jun. 18, 1935. Entered in Court Journal No. 19, Page 394. [54]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now Wilhelmina Sumi, one of the petitioners for appointment as guardian of George Houston and Ruth Marion Cook, minor children of the said deceased by a former husband, and assigns as errors of the Court in the Findings of Fact and Conclusions of Law and the order and judgment herein, as follows:

I.

The Court erred in ignoring and overruling her exceptions to the petition of Alsie M. Young for appointment of guardian to the said children on the ground that his said petition was entitled as above, whereas it should have been entitled in order to give the Probate Court jurisdiction "In the Matter of the Appointment of a Guardian for

George Houston Cook and Ruth Marion Cook, minor children of Mayme Helen Young, deceased."

II.

The Court erred in refusing to adopt and use "Objections to and Amendments of Proposed Findings of Fact and Conclusions of Law" submitted by Mrs. Sumi prior to the signing of the Finding of Fact and Conclusions of Law, and in overruling her motion for a new trial.

III.

The Court erred in Findings of Fact No. 1 and 2 in the respect that the said Findings allege as a fact "that George Cook, father of George Houston and Ruth Marion Cook, died in 1926 but did not, prior to his death, make a will appointing some or anyone guardian of his said two children and that on March 21, 1934, said Mayme Helen Young, nee Mayme Helen Cook, made her last will and testament which was duly admitted to Probate on the 7th day of May, 1934, and that in said will she nominated Alsie Young, guardian of her said two minor children", for the reason that there was not a scintilla of evidence as to the death of George [55] Cook and his failure to appoint a Guardian by will upon which to base the said important and necessary Finding of Fact, and the will of Mayme Helen Young was not introduced in evidence at the trial or hearing, but was taken as judicially known to the Court.

IV.

The Court committed error at the hearing and trial of this matter in the Findings and final order and judgment in this: that the approval and confirmation of the appointment of Alsie M. Young, as guardian of said minor children, is limited to the persons of the said two minors and he is excluded from any management or control of their property and estate and James M. Young, a brother, is recognized as trustee of all their real and personal property, with possession and management thereof.

V.

The Court erred in its final order and judgment in that therein it confirms and approves the appointment of Alsie M. Young as Guardian of the said two minor children and ignores and denies the petition of Wilhelmina Sumi, their Grandmother, for appointment as Guardian of said minors, for the sole reason that Alsie M. Young was nominated as guardian in the will of Mayme Helen Young (which said will was not introduced in evidence) and without any reference whatever to the happiness, welfare and wishes of the said two minor children.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi.

Service of the foregoing Assignments of Error, by receipt of a copy thereof, is hereby acknowl-

edged this 15th day of June, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 18, 1935. N. H. Castle, Clerk, by E. A. Tonseth, Deputy. [56]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Now, on this 18th day of June, 1935, this cause came on regularly to be heard before the above Court, upon the petition of the above named plaintiff for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment of this Court made and entered in this action on the 14th day of June, 1935, and the Court being fully advised in the premises,

IT IS ORDERED that Wilhelmina Sumi's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby allowed.

It is further ORDERED that the amount of the Cost Bond herein be, and the same is hereby fixed in the sum of $250.00.

Dated, Fairbanks, Alaska, June 18th, 1935.

E. COKE HILL
District Judge.

Due service and copy hereof admitted this 15th day of June, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 18, 1935. N. H. Castle, Clerk.

Entered in Court Journal No. 19, Page 394. [57]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America, to Alsie M. Young, petitioner, and Cecil H. Clegg, his attorney, GREETING:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty (30) days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above entitled action, in which Wilhelmina Sumi is appellant and Alsie M. Young was and is petitioner for the same appointment and appellee, to show cause, if any there be, why the order and judgment made and entered in the above entitled action on the fourteenth day of June A. D. 1935, as mentioned in said order allowing appeal, should not be set aside and

reversed, and why speedy justice should not be done to said appellant above named in that behalf.

WITNESS THE HONORABLE CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America on this 18th day of June, A. D. One thousand nine hundred thirty-five, and of our Independence one hundred and fifty-ninth.

E. COKE HILL
District Judge.

Attest:
[Seal] N. H. CASTLE,
Clerk.

Due service of the foregoing citation admitted this 15th day of June, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

Entered in Court Journal No. 19, page 394.

[Endorsed]: Filed Jun. 18, 1935. [58]

[Title of Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE AND DOCKET CAUSE ON APPEAL.

This matter coming on for hearing upon the motion of Wilhelmina Sumi, appellant, for an order extending the time within which to file and docket the record herein on appeal with the Clerk of the United States Circuit Court of Appeals for the

Ninth Circuit, at San Francisco, California, and it appearing to the satisfaction of the Court, that the time allowed by law and the order of this Court allowing said appeal is insufficient for the purpose, and that the appellant desires an extension of time until and including August 1st, 1935, within which to file and docket said cause, and all and singular the matters being fully considered by the Court,

It is ORDERED that the appellant be and is hereby given and granted until and including August 1st, 1935, within which to file and docket the record on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated, Fairbanks, Alaska, June 18, 1935.

E. COKE HILL
District Judge.

Due service hereof admitted this 17th day of June, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

Entered in Court Journal No. 19, page 395.

[Endorsed]: Filed Jun. 18, 1935. [58½]

[Title of Court and Cause.]

COST BOND AND ORDER

KNOW ALL MEN BY THESE PRESENTS: That we, Wilhelmina Sumi as principal and Emil Pozza and Leo Preg as sureties, are held and firmly

bound unto Alsie M. Young, petitioner for appointment as Guardian herein, in the sum of Two Hundred & Fifty dollars, ($250.00) lawful money of the United States of America, to be paid to the said Alsie M. Young, his heirs, executors, administrators and assigns, for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

SEALED WITH OUR SEALS and dated this 18th day of June, 1935.

The condition of the above obligation is such, that whereas the above bounden Wilhelmina Sumi has filed her petition for appeal and is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain order and judgment made and entered by the above entitled Court in the above entitled action on the 14th day of June, 1935.

Now, therefore, if the above named Wilhelmina Sumi shall prosecute the said appeal to effect, and answer all costs if she shall fail to make good her plea, then this obligation shall be void, otherwise to remain in full force and effect.

WILHELMINA SUMI
EMIL POZZA
LEO PREG [59]

United States of America,
Territory of Alaska,
Fourth Division.—ss.

Emil Pozza and Leo Preg, being first duly sworn on oath, each for himself, deposes and says: I am

one of the sureties named in the foregoing bond; That I am a resident of the Fourth Judicial Division of Alaska; That I am not an attorney at law, Marshal, Clerk, or other officer of any Court; That I am worth the sum of two hundred & fifty ($250.00) over and above all just debts and liabilities, and exclusive of property exempt from execution.

EMIL POZZA
LEO PREG

Subscribed and sworn to before me this 18th day of June, 1935.

[Seal] LOUIS K. PRATT
Notary Public in and for Alaska.

My Commission expires June 25, 1936.

ORDER APPROVING BOND.

The above and foregoing cost bond is hereby approved on this 20th day of June, 1935.

E. COKE HILL
District Judge.

Due service of copy of above Bond and Order admitted this 20th day of June, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

O.K.
C. H. CLEGG

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 20, 1935. N. H. Castle, Clerk. [60]

[Title of Court and Cause.]

STIPULATION RE PRINTING OF RECORD AND PLACE OF HEARING APPEAL.

It is hereby stipulated by and between Wilhelmina Sumi and Alsie M. Young, petitioners for appointment as Guardian herein, through their respective attorneys, that in printing the papers and records to be used on the hearing on appeal in the above entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted in place of said title in all papers used as a part of said record, the words "Title of Court and Cause"; also that all indorsements on all papers used as a part of said record shall be omitted, except the Clerk's filing marks and the admission of service. It is also stipulated that this appeal may be heard at San Francisco, California.

Dated, Fairbanks, Alaska, June 18th, 1935.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi.
CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed Jun. 20, 1935. [61]

[Title of Court and Cause.]

MINUTE ORDER SETTING MOTION FOR STAY OF EXECUTION FOR HEARING.

On motion of Louis K. Pratt, Esq., attorney for Wilhelmina Sumi, ORDERED that the motion for an order staying the execution of the Order and Judgment heretofore rendered herein, be heard at 10:00 A. M. of Friday, June 28th, 1935.

Jun. 27, 1935. Entered in Court Journal No. 19, page 402. [62]

[Title of Court and Cause.]

HEARING ON MOTION FOR STAY OF EXECUTION.

The Court having heretofore on June 26th shortened time for notice of hearing on motion of Louis K. Pratt, Esq., to stay execution of Order and Judgment and said hearing being set for this time and the matter being argued by Mr. Pratt for Wilhelmina Sumi, the appellant, and by Cecil H. Clegg, Esq., in behalf of the appointed Guardian, Alsie M. Young, and the matter being thereupon submitted and the Court being fully advised in the premises, the following Order was signed in the above entitled cause:

On motion of Wilhelmina Sumi, by and through Louis K. Pratt, her attorney,

IT IS ORDERED that execution of the Order and Judgment herein of date June 14, 1935, be, and the same is hereby stayed until the appeal herein is

heard and decided in the United States Circuit Court of Appeals for the Ninth Circuit, and in the meantime no process of any kind shall be issued thereon.

Jun. 28, 1935. Entered in Court Journal No. 19, page 402. [63]

[Title of Court and Cause.]

ORDER

On motion of Wilhelmina Sumi, by and through Louis K. Pratt, her attorney,

IT IS ORDERED that execution of the Order and Judgment herein of date June 14, 1935, be, and the same is hereby stayed until the appeal herein is heard and decided in the United States Circuit Court of Appeals for the Ninth Circuit, and in the meantime no process of any kind shall be issued thereon.

Dated at Fairbanks, Alaska, this 28th day of June, 1935.

E. COKE HILL
District Judge.

Time for notice of hearing the application for stay of execution in the above matter is hereby shortened to 12 hours.

Done in Chambers at 12 o'clock noon, June 26th, 1935, at Fairbanks, Alaska.

E. COKE HILL
District Judge.

Received a copy of the foregoing order this 26th day of June, 135, at 2 o'clock P. M.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 28, 1935. N. H. Castle, Clerk.

Entered in Court Journal No, 19, page 402. [64]

BILL OF EXCEPTIONS

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div., Jul. 16, 1935. Alton G. Nordale, Clerk.

Re-filed in the District Court, Territory of Alaska, 4th Div. Jul. 25, 1935. Alton G. Nordale, Clerk. [65]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on January 2nd, 1935, the above entitled Matter came on to be heard before the Court upon the appeal of Wilhelmina Sumi from the order and judgment herein of the Probate Court for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, of date October 26, 1934, upon the transcript of the proceedings in the Probate Court and the exceptions of Wilhelmina Sumi to such proceedings and to the order and judgment entered by the Court below. Louis K.

Pratt appeared as attorney for Wilhelmina Sumi and Cecil H. Clegg, for Alsie M. Young.

Testimony was introduced by both Petitioners as follows:

WILHELMINA SUMI,

a witness in her own behalf, after being duly sworn, testified as follows:

Direct Examination

By Mr. Pratt:

My name is Wilhelmina Sumi; I am 54 years of age and have lived in Fairbanks, Alaska, at 7th and Noble Streets, for the past 28 years. When I came to Fairbanks I was a married woman but my husband died in 1916. During the marriage relation we had three children born to us, all girls, whom we named Mayme Helen, Violet Naoma and Sylvia Ethel. My daughter Mayme Helen Sumi in 1922 married George Houston Cook who died in 1926. During their married relation three children were born to them, viz: Mayme Gertrude, George Houston and Ruth Marion Cook. Two of her children George [66] Houston and Ruth Marion Cook are involved in this proceeding. After George Cook's death they stayed with me for more than half of the time and I have got them now. I have taken care of them just as though they were my own, furnishing them with food, clothing and schooling. Since the death of Mayme Helen Young, mother of these two children, I have had them with me all of the time.

(Testimony of Wilhelmina Sumi.)

Q. Mayme married Ed. Young in 1928, didn't she?

A. Yes.

Q. And these two children stayed with their mother after that?

A. They stayed with me. The little girl stayed with me until Christmas, after she was married, and the boy stayed with me all winter until the next spring.

Q. And after that were there any intervals when the children would come and stay with you?

A. Yes. The time they went outside when Ed. Young won the ice pool they stayed with me four months.

Q. Both of them?

A. Yes, and they stayed with me a week time and times again.

Q. After she married Ed. Young?

A. Yes.

Q. Do you desire to keep them?

A. I do. Yes.

Q. You filed a petition asking that you be appointed guardian.

A. Yes.

Q. Now, at the hearing was there any testimony taken whatever with reference to Mr. Alsie M. Young's petition and your protest and

(Testimony of Wilhelmina Sumi.)

petition in the Probate Court? Was there any testimony taken at all?

The COURT: I think it will be conceded that there was no testimony taken.

Mr. CLEGG: Yes, Your Honor.

A. No.

Mr. PRATT: Cross-examine.

Cross Examination

By Mr. CLEGG: After George Cook's death she placed the children [67] with me and agreed to pay me $75.00 per month for taking care of them, but she didn't have money enuf to do that and she only gave me an occasional $5.00 or $10.00. She went to work in a restaurant. After she married Ed. Young in 1928, she and her husband went outside and were gone for four months and during that period the two children George Houston and Ruth Marion were left with me and I took care of them. Ed. Young gave me a check for $150.00 for the four months period and my daughter, Mayme Helen Young, shortly before her death, handed me a check for $100.00 and another for $80.00. The $150.00 check and the $180.00 checks and the occasional $5.00 and $10.00 was all I ever received from anybody for taking care of those children. I have always worked and earned money. Sometimes I have worked for the government, sometimes for three, four, five or nine months of the year at $150.00 per month. I worked for the government

(Testimony of Wilhelmina Sumi.)

in the Detention Hospital and at the Jail taking care of women prisoners or insane women. At the time of my husband's death my three children were minors. After you (Mr. Clegg) went on the bench, you asked me to accept assistance from the Territory for my minor children. I did not ask it but I did, for a period of four years, accept assistance for two of my minor children until they were 16 years of age, that is, for a period of four years, but I never received anything from any source on account of my oldest daughter Mayme Helen Young. Other than that I have never received a penny from anybody and have taken care of myself, my children and my grandchildren from my own earnings. I went to school six years in my youth in the old country but never attended school in America. I was 16 years of age when I came to America and was married at the age of 23. Three girls were born to me but no male child. I have taken care of other people's children a lot, sometimes for as long as two or three months.

Re-Direct Examination

I have had practically nothing for taking care of my two [68] grandchildren and after my daughter married Ed. Young, time and time again, I have bought shoes and clothes for them. I own a lot in Fairbanks with a story and a half log house situate thereon, containing four rooms. I have another cabin on the same lot which I rent and my income

comes from the rental and for housework and work for the government.

Q. Can you take care of these children and clothe them and give them good food and send them to school?

A. Yes. I can.

Q. You can earn enough to do that?

A. Yes.

Q. You are willing to do that?

A. Yes. I am willing to do that.

Q. Why are you so willing?

A. Because I love them and they were mine.

Q. This man, Alsie M. Young, was here one time a few months ago.

A. I heard he was here but I didn't see him.

Q. He didn't call to see you or the children?

A. No.

Mr. PRATT: That is all.

ANDREW NERLAND,

a witness for appellant, after being duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. PRATT: My name is Andrew Nerland, age 64 years. I have lived in Fairbanks, Alaska, since 1904. I am acquainted with Wilhelmina Sumi and have known her for something over 20 years; in carrying on my work I have been at her home a

(Testimony of Andrew Nerland.)

number of times papering the place, putting down carpets in her house and of course I have seen her frequently at other places. I know her fairly well. My business is handling paint, paper, selling furniture, carpets, linoleum, windows, sashes and doors; things of that kind.

Q. From what you know of Mrs. Sumi, what would you say as to her fitness and qualifications to act as guardian of two [69] minor children, these children that are involved in this proceeding, George Houston Cook and Ruth Marion Cook. The boy is ten years old and the girl nine I think.

Mr. CLEGG: We object as incompetent and immaterial.

(Objection overruled, and Mr. Clegg asks for and is given an exception).

A. Knowing the way she brought up her own children under very trying circumstances, I would say that the present time under more favorable circumstances she would be more capable of taking care of these children even than she took care of her own.

Q. How do you say she took care of her own?

A. In a substantial way, I would say.

Q. Would it be your opinion and judgment that she is a proper person to have the care, education and control of these two children? Would that be your judgment and opinion from what you know of her?

A. It would.

(Testimony of Andrew Nerland.)

Cross Examination

By Mr. CLEGG: That is just my opinion based on my acquaintance with her; when this contest came up I expressed myself at least twice that Mrs. Sumi ought to have these children; I did not know anything about the legal questions involved. I think I know the circumstances pretty well and I want to say this Judge Clegg, that so far as expressing myself frequently I did say I did but outside of two occasions I don't think I ever discussed the case in our store or any place else. I did express it, yes, and I had a decided opinion about it and have today; that opinion is not on account of my sympathy for Mrs. Sumi but on account of my sympathy for the children; I have never said it would be a shame to take them out of the country, but I do know as a father of children myself, I do know that I feel that Mrs. Sumi can better take care of those two children that she has taken care of for a [70] long time—I myself know that she has kept them for a long time—she perhaps can take better care of them than many people could.

Mr. CLEGG: That is all.

JOHN E. YOUEL,

a witness for appellant, after being duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. PRATT: My name is John E. Youel, age 60 years, residence Fairbanks, Alaska, by profession I am a Presbyterian Clergyman. I am acquainted with Wilhelmina Sumi and the two children George Houston Cook and Ruth Marion Cook. Have known Mrs. Sumi for 7 years and the children for about 8 years. I have seen a good deal of them. I know where they live and have been to her house which is a very comfortable home; she is industrious, hard working and conscientious. She does housework or work of that character and sometimes works at the Detention Hospital.

"Q. From what you know of her, what would you say as to her fitness and capacity to have the control and the education and maintenance of these two children?

(Mr. Clegg objects as incompetent, irrelevant and immaterial. Objection overruled and Mr. Clegg asks for and is given an exception.)

A. I consider that she would be very competent and capable. I know a great deal about what a mother or a guardian, or what a person, should do for children, and the actual relations existing between them.

(Testimony of John E. Youel.)

Q. What are the relations, so far as you have observed, as between Mrs. Sumi and these two children?

A. Very tender and sympathetic."

Mr. PRATT: That is all.

Mr. CLEGG: No questions. [71]

LOUISE VAN BIBBER,

a witness for appellant, after being duly sworn, testified as follows:

Direct Examination.

By Mr. PRATT: My name is Louise Van Bibber; I live in Fairbanks, Alaska, and have lived here since 1908. Wilhelmina Sumi lived here at that time but I did not meet her until 1910 when I became acquainted with her and afterwards talked with her about the children going to school. I have known her for twenty years or so and have visited at her home at times, every once in awhile I go to her home. I know the two children George Houston Cook and Ruth Marion Cook and I know the relations that exist at this time and have for a long time between the children and Mrs. Sumi. They are very fond of their Grandmother and the Grandmother of the children.

"Q. From what you know of her, what would you say of her fitness to be the guardian and have control of the two children?

(Testimony of Louise Van Bibber.)

Mr. CLEGG: We object on the ground that the question is irrelevant, incompetent and immaterial.

The COURT: She may state whether she thinks Mrs. Sumi is a fit person or not.

(Mr. Clegg asks for and is given an exception.)

A. I certainly think she is a fit person.

Mr. PRATT: Cross-examine.

Mr. CLEGG: No questions.

The COURT: Are you going to contest Mrs. Sumi's fitness?

Mr. CLEGG: I submit it is incompetent, but we do not make any dispute about that."

AGNES HERRING,

a witness for appellant, after being duly sworn, testified as follows, to-wit:

Direct Examination.

By Mr. PRATT: My name is Agnes Herring; I have lived in Fairbanks [72] Alaska for 28 years; I have known Wilhelmina Sumi for 28 years. I know her children and grandchildren. I live one block from their home.

"Q. From what you know of her and of the children, what would you say of her being a fit person to be made guardian of those two child-

(Testimony of Agnes Herring.)

ren and to have their bringing up and educa tion?

(Mr. Clegg objects as incompetent, irrel evant and immaterial. Objection over ruled and Mr. Clegg asks for and is given an exception.)

A. I would think Mrs. Sumi very fit to take care of the children.

Q. What would be your idea of Relatively, now she being the guardian of those two children, and sending them to Coleman, Michigan, to a stranger by the name of Alsie M. Young; what would you say as between those two?

Mr. CLEGG: I object as irrelevant, incompetent and immaterial.

The COURT: I will sustain the objection.

Mr. PRATT: Cross-examine.

Mr. CLEGG: No questions.

Mr. PRATT: These children are here. I ask to bring these children forward and let them testify.

The COURT: I think I will deny that. I think I am going to consider from the present state of things that they will prefer to go to their Grandmother. I think I will accept that as their position. They are quite young.

Mr. PRATT: I couldn't hear that.

The COURT: I think I shall accept as a condition in this proceeding, without any proof, that in their present situation, having lived a

(Testimony of Agnes Herring.)

good deal of the time with their Grandmother, that they have a natural affection for her and would like to stay with her. I think I will accept that as the fact, the situation.

Mr. PRATT: That is all." [73]

WILLIAM J. CAMPBELL,

a witness for Alsie M. Young, Appellee, after being duly sworn, testified as follows, to-wit:

Direct Examination.

By Mr. CLEGG: My name is William J. Campbell, by occupation I am a carpenter and have lived in Fairbanks, Alaska, since 1904 and still reside here. I know Alsie M. Young, of Coleman, Michigan, having visited at his residence there last February. I know his wife and three sons. He has a very fine home. I met his brother and his brother's wife, and his father and mother and a sister. They all appeared to me to be substantial people. Coleman, Michigan is a small town, probably 700 or 800 people. They have a school there; the community surrounding it consists of farms and some oil wells.

"Q. In your judgment would Alsie M. Young be a competent person to have the care and custody of these two children, George Houston Cook and Ruth Marion Cook?

A. Yes sir.

Mr. CLEGG: Cross-examine."

(Testimony of William J. Campbell.)

Cross Examination.

By Mr. PRATT: I went to Seattle last November and met Mrs. Young and she asked me to go over and see Mr. Young because she had made a trip there for the purpose of finding a place for her children. I mean Mayme Helen Young. She asked me to go there and see this Alsie M. Young, Coleman, Michigan and I went. I was there twice and stayed six or seven days in the house with Alsie M. Young and his family. I paid my own expenses there, most of them. Alsie M. Young hauled me from Redmond, Michigan, where I got off the steamer on Lake Michigan and back to Detroit, otherwise I paid my own expenses. That was the only time I ever saw Mr. Young except that I saw him here in Fairbanks between trains. That is practically all I know about him except that I knew from Mayme Helen Young that there was such a man as Alsie M. Young and I have heard him talked about here in Fairbanks for two or three [74] years. I learned about Alsie M. Young and his connections in Michigan by being a guest of his for seven days last Fall.

"Mr. Clegg: I will offer at this time the deposition of

ALSIE M. YOUNG,

in evidence. (Reads) 'Deposition of Alsie M. Young, taken in his own behalf, at Fairbanks, Alaska, on November 15, 1934, before E. T. Wolcott, Notary Public, in the presence of Cecil H. Clegg, Esq, Attorney for Alsie M. Young, Guardian, and Louis K. Pratt, Esq., Attorney for Wilhelmina Sumi, Appellant. Alsie M. Young, being first duly sworn, testified as follows, to-wit:—

Direct Examination by Cecil H. Clegg.

My name is Alsie M. Young; I live in Coleman, Michigan, and by occupation am a Rural Mail Carrier under the post-office department. I received my appointment from the Postmaster General and have been acting in that capacity for 9 years. I carry the mail and deliver it to patrons in the country, starting at 8:00 o'clock in the morning and returning about 1:00 o'clock in the afternoon, the balance of the day I work around the house and grounds. I was born in Coleman, Michigan and have practically lived there all my life, except for 5 years. After I graduated [75] from High School I worked for the telephone company for one year and enlisted in the Army for 14 months during the World War. During my service I was at camps at Chambers, Illinois, Scott Field, Illinois and Rockwell Field, California. I was in the Air Service and enlisted as a Private and was discharged as a 2nd Lieutenant. After my discharge from the Army I was appointed 2nd Lieutenant in the Re-

(Deposition of Alsie M. Young.)

serve Corps and later was promoted to 1st Lieutenant. In 1930 I received a "Rating Certificate", Air Corps, United States Army, good for five years from its date, signed by Lieutenant Miller, Chief of Personnel Division.

(This book was allowed in evidence without objections and was marked Exhibit No. 1 as a part of the witness' deposition.)

My parents have lived in the State of Michigan all of their lives. My Mother and Father are still living there in Coleman. My Mother's age is 69. They live in Coleman, Michigan, a town of about 1000 population. My parents have lived there for 40 years and are American born of Scotch, English and Irish extraction. I have four brothers and one sister; James, 44 years of age, being the oldest. His occupation is that of Telephone Engineer for the Michigan Bell Telephone Company and he is located at Menominee, Michigan. He is a single man and has worked for that company about 20 years. The next oldest brother is William, Wholesale Dealer for the Standard Oil Company at Coleman, Michigan and has occupied that position for about one year, but was for the past 5 years an Inspector for the Michigan Bell Telephone Company. I have another brother, Donald, age 24, a factory employee, located at Detroit and have a sister who lives at Royal Oak Michigan. She is married and older than me. I am 38 years of age, my health and that of my parents is good. My

(Deposition of Alsie M. Young.)

brothers and sister were all raised in the town of Coleman, or vicinity. The climate is moderate in summer and moderate in winter. In winter the temperature would average 28 to 30 above. I would call it a salubrious climate and a healthy one. Coleman is 40 miles from [76] Saginaw, 20 miles from Midland, 20 miles from Mount Pleasant, 200 miles from Menominee, 125 miles from Royal Oak. Midland is a town of 10,000; Saginaw 40,000; Mount Pleasant 10,000. I was married in 1925 at Houghton Lake, Michigan to Katheryn Sutter who is still living and with me at Coleman. We have three boys, 8, 7 and 4 years old. I live in a frame house of 9 rooms which I own and have owned for the past three years. The lot on which the house stands is probably 150 feet square, the title to which is in me. There are on this lot of mine apple trees, lilac trees and a great many other shrubs. The public school which is a grade and high school is one block from my home; has 8 teachers. I was graduated in this school district from the old school house, the present one is a new building. I graduated in 1916. My wife was a graduate of Central State Teachers College and taught school for 6 years. She is now 32 years of age and in good health. Myself and boys are all in good health. I have photographs of my two oldest boys and a snapshot of the youngest boy Tom, 4 years of age. (At this point the photographs and snapshot mentioned by the witness were admitted in evidence

(Deposition of Alsie M. Young.)

and marked as Exhibit No. 3. They showed three bright, intelligent looking and neatly dressed boys.) My house is completely furnished.

"Q. Are you able to take care of two extra children?

A. Yes.

Q. These two children of Mayme Helen Young, known as George Houston Cook and Ruth Marion Cook?

A. Yes.

Q. In your home?

A. Yes.

Q. Is it possible for yourself and your wife to look after them and their care and comfort?

A. Yes.

Q. Do you apprehend any difficulty in doing so?

A. No.

Q. Did you know Mayme Helen Young in her lifetime?

A. Yes.

Q. When did you get acquainted with her?

A. I don't know the [77] year. I know how long it was after her marriage to my brother.

Q. What was the occasion of that last acquaintance? How did you come to get acquainted with her?

A. She and Ed visited with us back home.

(Deposition of Alsie M. Young.)

Q. Was that the year he won the ice pool or part of it?

A. Yes.

Q. Was that in the spring or summer of the year that he visited you?

A. In the summer. It was in June.

Q. For how long?

A. About four weeks.

Q. Did they stay at your house, that is, Mr. Young and Mayme Helen Young, his wife?

A. They stayed at our home possibly a week of that time and the rest of the time they spent at the Lake and we were there at the Lake with them.

Q. What Lake is that?

A. Houghton Lake.

Q. Did you afterwards see Mayme Helen Young in her lifetime in Michigan?

A. Yes.

Q. At your home?

A. Yes.

Q. When was that?

A. About ten days after my brother's death.

Q. You mean George Edward Young?

A. Yes.

Q. Where did she come from when she visited you at that time?

A. Seattle.

Q. Where had she been in Seattle, if you know?

(Deposition of Alsie M. Young.)

A. At the hospital.

Q. And how long did she stay visiting you at that time?

A. She was back and forth between our home and Detroit at my sisters.

Q. You mean at Royal Oak?

A. Yes.

Q. Is that the same place as Detroit?

A. Yes. It is a suburb of Detroit.

Q. Is that where your sister lives?

A. Yes.

Q. She was visiting back and forth?

A. Yes. About thirty days.

Q. Visited you and your sister and your wife?

A. Yes.

Q. How often was she at your home during that period?

A. About four times.

Q. How long would she stay ordinarily?

A. A day or two days. [78]

Q. When she returned to Seattle you never saw her again?

A. No.

Q. I want to ask you about the sanitation conditions in Coleman where you live. Are they ordinary sanitation requirements of towns of that size?

A. Yes.

(Deposition of Alsie M. Young.)

Q. Has there ever been any considerable epidemic or disease——

(Interrupted) A. No.

Q. ——ravaging the town?

A. No.

Q. Is there a good water supply there?

A. Yes.

Q. Do you have your own water supply?

A. Yes.

Q. In your house?

A. Yes.

Q. What sort of heating appliances do you require there, if any?

A. Coal stoves.

Q. Is your house well and comfortably heated?

A. Yes.

Q. How far are you from Lake Michigan there?

A. A hundred miles.

Q. Is there any line of railroad going through Coleman?

A. Yes.

Q. What is it?

A. The Pierce Marquette.

Q. Do you have any airplane connection there?

A. No.

Q. How are you fixed for churches?

(Deposition of Alsie M. Young.)

A. There are about four churches in the town.

Q. What denominations are they?

A. Methodists, the Saints, the Catholic—(Interrupted)

Q. Saints?

A. Latter Day Saints and Roman Catholics.

Q. What denomination do you adhere to, if any?

A. Episcopalian.

Q. What denomination, if any, does your wife belong to?

A. The same.

Q. Is there any Episcopal Church in the town of Coleman at the present time?

A. No.

Q. Do you send your children to any Sunday school?

A. Yes.

Q. Which one?

A. The Methodist.

Q. Do they go and attend regularly?

A. Yes.

Q. All of them?

A. Yes." [79]

The Highschool building has a gymnasium where the children play basketball and such games in winter time. They have a Physical Instructor, that is, one of the teachers does that as a part of

(Deposition of Alsie M. Young.)

the regular instruction. The playground is open to the school children and is about 300 feet square. It is equipped with merry-go-round, giant slides, swings and all such recreation equipment. We have a doctor in town, a young man. He has a good general practice and has a good standing. If necessary we can go to some of the larger cities, and we do so at times, for medical assistance. The roads leading to and from Coleman are good paved roads suitable for automobiles. I have an automobile of my own. I should say that the living conditions in Coleman are very good. Living expenses are very low. Coleman is surrounded by a farming community where potatoes, corn, beans, hay and all dairy products are produced and grown. You might call it a general farming community. There are dairies adjacent to the town of Coleman which furnish pure milk to the people living in that town. I belong to the American Legion and Masonic organizations and at present am Commander of the American Legion at that point, was elected last October and will continue in office for one year. I have belonged to the Masonic organization since 1918. I have never held any position with the city government for the reason that postal employees are not allowed to go into anything of that kind. My father was a mail carrier and carried on the same route that I carry for 21 years. My income as rural mail carrier is $230.00 per month net. The town of Coleman is more than 100 miles from Fair-

(Deposition of Alsie M. Young.)

banks. I left there October 28, 1934 and arrived here November 11th. I stopped one day in Seattle, came by ocean steamer to Seward and from there to Fairbanks by rail. Donald Young is the son of Mayme Helen Young and my brother Ed. Young. I saw the child at Menominee. With the exception of the technical training that I had while connected with the Aviation branch of the United States Army during the World War, I never had any other education after graduating from the high-school [80] in Coleman.

"Q. Are you willing now to undertake the responsibility that will devolve upon you under the law as guardian of these two children of Mayme Helen Young,—George Houston Cook and Ruth Marion Cook?

A. Yes.

Mr. CLEGG: You may take the witness."

Cross Examination.

By Mr. PRATT: I never saw Mayme Helen Young until she came there on visits to Michigan. I have never been in Alaska before. Mayme Helen Young was there in Michigan about one month each time. She was at my house a week or ten days each time, something like that. She had with her one child, her son Donald, Ed. Young's child but didn't have the Cook children. I knew she had married George Cook before she married my brother Ed.

(Deposition of Alsie M. Young.)

"Q. What occasioned you to come here, Mr. Young? What is your purpose in being here?

A. I came here to take custody of the children.

Q. To take custody of the children?

A. Yes.

Q. And you are going back?

A. Yes.

Q. Tomorrow morning?

A. Yes.

Q. Without them?

A. Yes.

Q. Who notified you or suggested that you come here?

A. Joe Crosson and my attorney, Mr. Clegg.

Q. Now, what is the value of your home, just in round numbers, a fair estimate?

A. Two thousand dollars.

Q. And your automobile?

A. Three hundred and fifty.

Q. Have you any other property?

A. No, except furniture and things like that.

Q. Household furniture?

A. Yes.

Q. Would the two thousand dollars be the house and the furniture or without the furniture?

A. Without the furniture. The furniture is valued at about fifteen hundred. [81]

(Deposition of Alsie M. Young.)

Q. You haven't got any other property?

A. No."

I have read the will of Mayme Helen Young and am familiar with the fact that the Executor of her Will returned an Inventory showing that Mayme Helen Young left property which would belong to George Houston Cook, Ruth Marion Cook and the little boy Donald Young. My brother James M. Young told me that Mayme Helen Young in her lifetime gave him $5000.00 in cash here at Fairbanks but I never knew that she gave him a check on a Detroit bank for $3000.00. I never heard of that. The $5000.00 I know of. My entire round trip expenses have been paid by Joe Crosson of Fairbanks, Alaska. I have never seen the two children George Houston Cook and Ruth Marion Cook.

"Q. You say you are willing to take them and be their guardian until they are twenty one years old and take them back to Coleman, Michigan, and take them into your own family and educate them and look after them and take care of them?

A. Yes.

Q. You say that?

A. Yes.

Q. Isn't this true: That it is because you know that they have got money and the equivalent of money amounting to twenty five or thirty thousand dollars? Isn't that the reason you are willing?

(Deposition of Alsie M. Young.)

A. No.

Q. Has that got anything to do with it at all?

A. No.

Q. Suppose you knew they didn't have anything at all, would you take them out of this country and take them clear back there and do all that for them in your own home?

A. Yes. That is why I promised to do it.

Q. What reason can you give why you would do such a thing?

A. Because Mayme Helen Young asked me.

Q. Because Mayme Helen Young asked you?

A. She didn't ask me, but she was worried about things like that that might happen.

Q. Did she ask you to be a guardian of her two children?

A. No.

Q. But you now are willing to be guardian?

Mr. CLEGG: I would like to call the witness's attention to the [82] terms of her will when he answers that question.

A. Why, I thought you (To Mr. Pratt) meant that she asked me personally fact to face. She asked me in the will to be the guardian of these children.

Mr. PRATT: Q. That is what you are talking about.

A. Yes.

(Deposition of Alsie M. Young.)

Q. She didn't ask you personally?

A. No.

Q. You mean that she appointed you guardian?

A. Yes.

Q. She never said anything to you on the subject?

A. No.

Q. Because she made the will months after you saw her the last time, didn't she?

A. Yes.

Q. You know, do you not, that your brother James M. Young had much to do with the making of that will, don't you?

A. I don't know.

Q. Hadn't he told you so?

A. No.

Q. Did you ever talk with him about it?

A. Yes.

Q. Have you read that will?

A. Yes.

Q. Don't it look on the face of it like a very remarkable document?

A. He told me that that was her own idea.

Q. I asked you if it didn't look like a very remarkable document in view of the fact that you people are strangers to her and had lived in Michigan all their lives and she lived all her life in Alaska. Didn't that look strange; a strange will to you?

(Deposition of Alsie M. Young.)

A. We are not strangers to her.

Q. Well, you are almost strangers, aren't you?

A. No. We are relatives to her.

Q. Personally you never had any contact with her or talked with her except on those two occasions, did you?

A. No.

Q. You have never seen the children in your life, have you?

A. No.

Q. Of course, your wife and children have never seen them either, have they?

A. No.

Mr. PRATT: That is all." [83]

Redirect Examination.

By Mr. CLEGG: During my cross-examination I was interrupted, I was going to and intended to say that Mayme Helen Young when she was talking to me in Michigan was worried about her own financial condition whether she could take care of her children at some future time, then I offered her my services, myself, my wife, my home to take care of the children if that event ever occurred. That conversation occurred October, 1933, when she was there at my home town, Coleman, Michigan, shortly after her husband's death.

(Deposition of Alsie M. Young.)

Re-cross Examination.

By Mr. PRATT: Q. She hadn't at that time collected her insurance and employee's compensation, had she?

A. I don't think so. She didn't mention it.

Q. Didn't you know she hadn't collected it at that time; that that was what she was worried about?

A. Possibly.

Q. You knew that Ed. Young had twenty thousand dollars in life insurance?

A. I didn't know how much he had. I knew of ten thousand that he had.

Q. He may have had ten thousand more, as far as you knew?

A. Yes.

Q. Don't you think he did have ten thousand dollars more?

A. I found out later that he had more.

Q. You know now that he had twenty thousand?

A. I don't know.

Q. You also know that she collected seventy five hundred dollars as employee's compensation under the compensation Act of Alaska?

A. No. I don't.

Q. Did you ever hear of that?

A. I have heard of it but I didn't know the amount or what funds it came out of.

(Deposition of Alsie M. Young.)

Q. You know she collected whatever the law gave her for the death of her husband. You knew that?

A. I knew it when?

Q. You have known it for some time.

A. Yes.

Q. You knew when she was there in Michigan that she expected to do that or hoped that she could, didn't you?

A. Yes. [84]

Q. You heard of that since?

A. I heard of that since.

Mr. PRATT: That is all."

JOE CROSSON,

a witness for Appellee, after being duly sworn, testified as follows, to-wit:

Direct Examination.

By Mr. CLEGG: My name is Joseph Crosson. I live in Fairbanks, Alaska, and by occupation am a pilot and Operating Manager of the Pacific Alaska Airways. I was acquainted with George Edward Young during his lifetime. He was flying for the same company, and he and myself have been in their employ and flying planes for the past five years. I was acquainted with his wife, Mayme Helen Young. I knew both of them very well. I

(Testimony of Joe Crosson.)

know Alsie M. Young of Coleman, Michigan, got acquainted with him in October, or November, 1933, at Detroit, Michigan. I went to Coleman, Michigan and was at the home of Alsie M. Young for two days and met his wife and children. They have a very nice home. I couldn't say just how well but they probably live much more comfortable than the average person here in Fairbanks. They have some conveniences that they don't have here. Coleman is a very small town, it is not large at all, it is a sort of modest little town, I don't know just how to express it. It is surrounded by farming country. I saw a schoolhouse there, probably a block from Alsie M. Young's residence.

"Q. What estimate did you form of Alsie M. Young as a father to take care of children?

A. Well, they gave me the impression that evidently they were very competent parents.

Q. What estimate did you form of Mrs. Young as to the care and custody of children?

A. Very good. Their children were very well behaved and their home well kept.

Q. Did you meet Alsie M. Young's relatives there.

A. I did.

Q. How many?

A. His father and mother and his brother William Young and his wife.

Q. How far does Alsie M. Young live from where he lives? [85]

(Testimony of Joe Crosson.)

A. Possibly three blocks or so.

Q. They have a comfortable home there?

A. Very comfortable.

Q. Is it what you would consider a nice location for a small town?

A. It is.

Q. And a good place to raise children?

A. It would appear to me to be very good.

Mr. CLEGG: Cross-examine.

Cross Examination.

By Mr. PRATT: Q. Mr. Crosson. You are taking a good deal of interest in this matter, and have, haven't you?

A. You might say I have.

Q. You got yourself appointed guardian once, didn't you?

A. I did, for a purpose.

Q. You paid Alsie M. Young's expenses from Coleman, Michigan and back lately, didn't you?

A. I did.

Q. All you know about Mr. Alsie M. Young and his family is what you learned by being there a couple of days. Is that it?

A. Not necessarily. No.

Q. Did you ever see them before? Were you ever there before or since?

A. No. But I have heard a great deal of them.

(Testimony of Joe Crosson.)

Q. I am talking about what you know yourself. You have never been in Coleman but two days in your life, have you?

A. Two days is all.

Mr. PRATT: That is all.

Mr. CLEGG: We rest.

Mr. PRATT: Mrs. Sumi will rest.

The foregoing was all the evidence seen and heard by the Court at the trial of said appeal. [86]

On April 16, 1935, Hon. E. Coke Hill, Judge of said Court rendered

HIS ORAL OPINION

as follows:

In the matter of the Estate of Mayme Helen Young, deceased, Number 3806, which is here upon exceptions to an order of the Commissioner, those exceptions involving questions of jurisdiction and involving the question of the fitness of Alsie M. Young to be guardian, I think that the law requires me to respect the will unless I am able definitely to say from the proofs introduced before me that it will be to the disadvantage of the children. That I have the power to set aside the provisions of the will if I am convinced that it is to the disadvantage of the children, I have no doubt. But there is nothing in the evidence which shows that to me. So far as the evidence goes, he is a

perfectly competent and fit person to have charge of the children.

I have delayed deciding this for a long time because I was moved by sympathy for the grandmother. I thought it would not hurt the children at all, and it would be a kindness to her, to let her have them the rest of the winter. The school term is about to end and my suggestion is that they be allowed to stay here until the school term is over if they are going to school, and then that Alsie M. Young take charge of them. It is a hard thing to take them away from the grandmother, but I see no alternative unless I violate what I really believe, and that is that Alsie M. Young is a perfectly competent and fit person. I am not finding that the grandmother is not a fit person. I am simply being governed by that which I think is compulsory—the provision of the will. As to the technical objections: That is, that the matter is not entitled in the proper way, I find decisions treating of just this sort of matter where they are entitled as this is, and I find at least one or two statements in discussing that, that it makes very little difference. It may be approached from either [87] end. As to the matter of the non-residence of Alsie M. Young, I am inclined to follow the ruling in the Estate of Walsh, or Guardianship of Walsh,—I forget which it is,—in the New York Supplement. It is cited in Mr. Clegg's brief. Therefore, I shall sustain the ruling of the Commissioner.

You may prepare your findings and judgment to that effect. [88]

[Title of Court and Cause.]

CERTIFICATE AND ORDER.

Judge E. Coke Hill who tried the above cause, having been succeeded by me, and the evidence in said trial having been taken in stenographic notes by the official Court Reporter, and by him transcribed, and transcript filed in this cause and being before me, and I being fully satisfied that I can allow a true bill of exceptions in said cause,

I, Harry E. Pratt, Judge of said Court, hereby certify that the above and foregoing Bill of Exceptions, pages 1 to 23 inclusive, contains all the evidence seen and heard by the Court at the hearing and trial of the appeal herein, as the same was introduced by Wilhelmina Sumi, Petitioner and Appellant, and Alsie M. Young, Petitioner and Appellee, including the exceptions taken to rulings of the Court during the progress of the trial; also that said Bill of Exceptions sets forth said evidence in condensed and narrative form, save as a proper understanding of the questions presented required that parts of it be set forth otherwise, in conformity to Rule 10 of the United States Circuit Court of Appeals, 9th Circuit.

AND IT THEREFORE settle, allow and sign the same as and for a true Bill of Exceptions and the Clerk of this Court is hereby ordered to refile

the same and when so refiled it shall become and be a true Bill of Exceptions of all matters [89] and things occurring at said trial not otherwise appearing of record and the same is hereby made a part of such record.

Dated at Fairbanks, Alaska, this 25th day of July, 1935.

HARRY E. PRATT
District Judge.

Received copy of the foregoing this ..... day of July, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jul 25 1935. Alton G. Nordale, Clerk.

Entered in Court Journal No. 19, Page 438. [90]

[Title of Court and Cause.]

ORDER EXTENDING THE TIME WITHIN WHICH TO FILE AND DOCKET CAUSE ON APPEAL.

WHEREAS, Judge E. Coke Hill, who allowed the appeal in the foregoing case, has been succeeded by the undersigned Harry E. Pratt as District Judge of the Territory of Alaska, Fourth Division, and

This matter coming on for hearing upon the motion of Wilhelmina Sumi, Appellant, for an order extending the time within to file and docket the record herein on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and it appearing to the satisfaction of the Court, that the time allowed by law and the order of this Court allowing said appeal and the order extending the time heretofore made is insufficient for the purpose, and that the Appellant desires an extension of time until and including October 1, 1935, within which to file and docket said cause, and all and singular the matters being fully considered by the Court,

IT IS ORDERED that the Appellant be and is hereby given and granted until and including October 1, 1935, within which to file and docket the record on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated, Fairbanks, Alaska, July 25, 1935.

HARRY E. PRATT
District Judge.

Entered in Court Journal No. 19, Page 439.

[Endorsed]: Filed Jul. 25, 1935. [91]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

TO THE CLERK OF SAID COURT:

Please prepare and certify to, a transcript of the record and files in the above-entitled matter as follows:

1st. The transcript of the proceedings in the Probate Court on which the appeal is based.

2nd. The Notice of Appeal and Exceptions of Wilhelmina Sumi. Also Motion to Dismiss Appeal.

3rd. The Findings of Fact and Conclusions of Law.

4th. The Objections thereto by Wilhelmina Sumi and her Proposed Findings of Fact and Conclusions of Law.

5th. The Motion to set aside the Findings of Fact and Conclusions of Law and grant a new trial.

6th. The final Order and Judgment.

7th. All other journal entries made during the progress of the case.

8th. The Bill of Exceptions complete.

9th. All papers connected with the appeal, except that the Citation on Appeal, the Stipulation as to printing record and place of hearing and the two extensions of time to file record in the C. C. A., 8th Cir. (4 papers) are original papers and go forward to the Appellate Court at San Francisco properly identified by you. If these 4 papers have been recorded in your office, they need not be incorporated in the transcript, because to do so would

be a duplication. The caption of each of these papers is "C. C. A., 9th Cir.",

10th. A copy of this Praecipe.

Dated at Fairbanks, Alaska, this 2nd day of August, 1935. [92]

LOUIS K. PRATT
Attorney for Wilhelmina Sumi.

Received a copy of the foregoing Praecipe this 2d day of August, 1935.

CECIL H. CLEGG
Attorney for Alsie M. Young.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug 2 1935. Alton G. Nordale, Clerk, by E. A. Tonseth, Deputy. [93]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

I, ALTON G. NORDALE, Clerk of the District Court, Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing consisting of 93 pages, constitutes a full, true and correct transcript of the record on Appeal in Cause No. 3806 entitled: In the Matter of the Estate of Mayme Helen Young, Deceased, and was made pur-

suant to and in accordance with the Praecipe of the Petitioner and Appellant, Wilhelmina Sumi, filed in this action, and by virtue of the said Appeal and Citation issued in said cause, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of page "a" is a correct index of said Transcript of Record, and that the list of Attorneys, as shown on page "b", is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to $26.85, has been paid to me by counsel for Appellant in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 11th day of September, 1935.

[Seal] ALTON G. NORDALE
Clerk of the District Court, Territory of Alaska, Fourth Division
By E. A. TONSETH,
Chief Deputy. [94]

[Title of Court and Cause.]

REQUESTED ADDITIONS TO "PRAECIPE FOR TRANSCRIPT ON APPEAL" MADE BY ALSIE M. YOUNG, GUARDIAN.

To the Clerk of the Above Entitled Court:

Please prepare and certify to a transcript of the records and files in the above entitled matter as follows:

1. The Last Will and Testament of Mayme Helen Young, deceased, the same having been referred to, incorporated in, and made a part of the original petition filed by Alsie M. Young, Guardian, in the Probate Court for the Fairbanks Precinct, Fourth Division, Alaska, entitled "Petition of Testamentary Guardian for Order Fixing Amount of Bond", said petition being the initial document filed in said Court and upon which the Judgment and Order was rendered in the District Court for the Territory of Alaska, Fourth Judicial Division, on which this appeal is based, a copy of which said Last Will and Testament certified by the United States Commissioner and ex officio Probate Judge for the Fairbanks Precinct, Fourth Division, Alaska, is attached hereto.

2. The proposed Findings of Fact and Conclusions of Law lodged with the Clerk of said Court by Alsie M. Young, Guardian, and marked "Lodged April 19, 1935".

3. These Requested Additions to "Praecipe for Transcript [95] on Appeal" made by Alsie M. Young, Guardian.

Dated at Fairbanks, Alaska, August 7th, 1935.

CECIL H. CLEGG

Attorney for Alsie M. Young, Guardian of the Persons of Ruth Marion Cook and George Houston Cook, Minors.

Service of the foregoing Requested Additions to Praecipe acknowledged August 7th, 1935, by receipt of a copy thereof.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug 7 1935. Alton G. Nordale, Clerk, by E. A. Tonseth, Deputy. [96]

WILL.

I, Mayme Helen Young, residing at Fairbanks, Territory of Alaska, being of sound and disposing mind and memory, and not acting under menance, duress, fraud, or undue influence of any person whomsoever, do make, publish, and declare this my last will and testament, and do hereby expressly revoke all other and former wills and codicils by me made.

(1) I hereby direct my executor, hereinafter named, to pay all my just debts and funeral expenses, as soon after my demise as can be lawfully and conveniently done.

(2) I hereby declare that I am a widow and that I have had four issue of my body, whose names are: Mayme Gertrude Cook, aged twelve years; George Houston Cook, aged nine years; Ruth Marion Cook, aged eight years; and Donald Edward Young, aged four years.

(3) I hereby give, devise, and bequeath to Kate Young, of Coleman, Michigan my marten skins.

(4) I hereby give, devise, and bequeath to my daughter, Ruth Marion Cook, my set of silverware and my silver fox skin.

(5) I hereby give, devise, and bequeath to my daughter, Mayme Gertrude Cook, my white fox skin.

(6) I hereby give, devise, and bequeath to Harry Dershimer, of Albion, Penn., as trustee, the sum of one thousand dollars, to be held in trust by him as such trustee, for my daughter, Mayme Gertrude Cook, and when my said daughter shall attain the age of twenty one years, said trustee shall pay over and transfer to her said one thousand dollars.

(7) I hereby give, devise, and bequeath all the balance of my estate, both real and personal, of whatsoever kind or character and wheresoever situated, to James M. Young, as trustee, to be held by him as such trustee, for the benefit of my son, George Houston Cook, my daughter, Ruth Marion Cook, and my son, Donald Edward Young, and to be held in trust during the time and for the objects and purposes hereinafter set forth:

(a) From the gross income received or derived from the trust estate there shall first be paid and discharged all taxes, assessments, costs, charges, and expenses incurred in the care, administration, and protection of the trust estate and the protection of this trust and its defense against legal or equitable

attack of any person, both during and after probate administration upon my estate.

(b) The said trustee may apply the whole or any part of the annual net income toward the maintenance, education, or benefit, equally, of my said three children, George Houston Cook, Ruth Marion Cook, and Donald Edward Young.

(c) When my said children, George Huston Cook, Ruth Marion Cook, and Donald Edward Young, shall attain the age of twenty one years, the said trustee shall pay over and transfer to each of said children one third of my said estate, in whatever form the same may be at the time. [97]

(d) In the event of the demise of any of my said children before he or she attains the age of twenty one years, the said trustee, James M. Young, shall give and divide his or her interest equally among my children then living.

(8) I hereby authorize and empower my said trustees herein named, to invest and re-invest the trust funds hereinbefore provided for, in any securities which said trustees deem best, and to change or vary investments from time to time as they may deem best.

(9) I hereby nominate, constitute, and appoint James M. Young as guardian of my said son, Donald Edward Young.

(10) I hereby nominate, constitute, and appoint Harry Dershimer as guardian of my daughter, Mayme Gertrude Cook.

(11) I hereby nominate, constitute, and appoint Alsie Young as guardian of my children, George Houston Cook and Ruth Marion Cook.

(12) I hereby nominate, constitute, and appoint C. W. Tibbitt, of Fairbanks, Territory of Alaska, as executor of this my last will and testament, without bonds, and I hereby give him power to sell all or any part of my estate, either real or personal, at private sale, without order of Court, with the exception of the stock which I now hold in the Hi-Yu Mining Company, which said stock is to be kept by him as such executor and turned over and delivered to such trustee hereinabove named, James M. Young. All the rest of my estate, consisting of real and personal property, is to be sold by said executor and converted into money and said money delivered to the said trustees hereinabove named, as hereinbefore provided.

In Witness Whereof, I have hereunto set my hand, on this the twenty first day of March, A. D. one thousand nine hundred thirty four.

MAYME HELEN YOUNG

The foregoing instrument, consisting of two pages besides this, was, at the date thereof, by the said Mayme Helen Young signed and published as, and declared to be, her last will and testament, in the presence of us, who, at her request and in her presence and in the presence of each other, have subscribed our names as witnesses thereto.

F. de la VERGNE M. D.
Residing at Fairbanks, Alaska
DAVIS RUNYAN
Residing at Fairbanks, Alaska. [98]

United States of America
Territory of Alaska
Fourth Judicial Division
Fairbanks Precinct—ss.

I, WILLIAM N. GROWDEN, United States Commissioner and ex officio Judge of the Probate Court in and for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, do hereby certify that the annexed and foregoing is a full, true and correct copy of the original Will of Mayme Helen Young on file in cause No. 549 in said Probate Court for the Precinct aforesaid, entitle: "In the Matter of the Estate of Mayme Helen Young, deceased," and now remaining among the records of said Probate Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Fairbanks, Alaska, this 6th day of August, A. D. 1935.

[Seal of Probate Court]

WILLIAM N. GROWDEN
United States Commissioner and ex officio Probate Judge, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska. [99]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

BE IT REMEMBERED That on the 2nd day of January, 1935, said day being one of the regular Court days of the General January, 1934, term of the above entitled Court, there came on regularly to be heard the appeal and exceptions of Wilhelmina Sumi from the order and judgment made and entered by the Honorable George W. Albrecht, Commissioner and ex officio Probate Judge of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, sitting as such, on the 26th day of October, 1934; that said order was made upon the petition of Alsie M. Young, testamentary guardian under the terms of the last will and testament of Mayme Helen Young, deceased, of her minor children, George Houston Cook, age nine years, and Ruth Marion Cook, age eight years, asking that his bond as such testamentary guardian be fixed by said Probate Court and that Letters of Guardianship issue to him by reason of said testamentary appointment, to which said petition said Wilhelmina Sumi had filed a protest requesting said Probate Court to cancel and revoke the testamentary appointment of said Alsie M. Young as such guardian and that he be not allowed to qualify by furnishing the bond required by statute and in the amount determined by said Probate Court; and said Court having examined the transcript of said

proceedings upon said hearing before said Probate Court now on file herein, and having examined the records of said Probate Court in the above entitled proceedings and having taken, heard and considered certain oral testimony on behalf of said appellant, Wilhelmina Sumi, and in behalf of Alsie M. Young, guardian aforesaid, the respective parties being represented herein by Louis K. Pratt, as attorney for said Wilhelmina Sumi, and by Cecil H. Clegg, as attorney [100] for Alsie M. Young, guardian aforesaid, this Court, being fully advised in the premises, does now make and enter herein the following

FINDINGS OF FACT.

I.

That Mayme Helen Young, prior to the 4th day of May, 1934, was a resident and inhabitant of the town of Fairbanks, Fourth Judicial Division, Territory of Alaska; that she died on said day in said town of Fairbanks; that at the time of her death she was the widow of George Edward Young, who died on September 20th, 1933; that she left surviving her, amongst others, two minor children, to wit, George Houston Cook, age nine years, and Ruth Marion Cook, age eight years, who were and are the children of said Mayme Helen Young and a former husband, George Cook; that said George Cook died at Anchorage, Alaska, on or about the 28th day of May, 1926, and that he had not, by last will and testament or otherwise, appointed a guard-

ian for either of said children; and that each of said minor children is now, and was at the date of said hearing in said Probate Court, living in the town of Fairbanks, Alaska, in the possession and custody of their grandmother, Wilhelmina Sumi, appellant herein.

II.

That prior to her death said Mayme Helen Young did, on March 21st, 1934, make, execute, publish and declare her last will and testament in writing, which said last will and testament was, on the 7th day of May, 1934, duly admitted to probate in the Probate Court, Fairbanks Precinct, Fourth Division, Alaska; that by the terms thereof the said testatrix, Mayme Helen Young, nominated, constituted and appointed Alsie Young as guardian of said minor children, George Houston Cook and Ruth Marion Cook, and nominated, constituted and appointed James M. Young as Trustee of all the real and personal property of her estate, with the exception of certain minor bequests, for the use and benefit, amongst others, of said George Houston Cook and Ruth Marion Cook, minor children involved in this proceeding. [101]

III.

That said Alsie Young, nominated and appointed guardian of each of said children aforesaid by said last will and testament, is the same person named as Alsie M. Young.

IV.

That said Alsie M. Young, by his said petition to the said Probate Court aforesaid, signified his acceptance of his appointment as guardian under the terms of the will of said Mayme Helen Young hereinabove mentioned, and requested said Probate Court for the Fairbanks Precinct, Fourth Division, Alaska, to designate the amount of his bond as such guardian and prayed that, upon compliance by him with the order of said Probate Court aforesaid fixing the amount of his bond as such guardian and its approval and acceptance by said Probate Court, Letters of Guardianship issue to him as such guardian under the hand and seal of said Probate Court.

V.

That said Probate Court did, by order duly made and entered on the 26th day of October, 1934, fix and determine the amount of bond of said Alsie M. Young as such guardian aforesaid in the sum of $3,000.00, and confirmed his appointment as such guardian under said will of Mayme Helen Young, deceased; that said Alsie M. Young, as such guardian aforesaid, furnished and filed with said Probate Court a bond in said sum with sufficient sureties and the same was duly approved by said Probate Court; that thereafter said Probate Court did issue to the said Alsie M. Young Letters of Guardianship authorizing him to perform all the duties required by law as guardian of the person of each of said minor children aforesaid; that thereafter

said Alsie M. Young made and filed with said Probate Court aforesaid his Oath of Office as such guardian in due and proper legal form; and that said Alsie M. Young is in all respects a fit, proper and competent person to act as such guardian and, as such guardian, he is entitled to the sole and exclusive possession and custody of each of said minor children, George Houston Cook and Ruth Marion Cook. [102]

VI.

That each and all of the exceptions taken, made and filed by the appellant, Wilhelmina Sumi, aforesaid to the order of said Probate Court is and are without merit in point of fact.

Dated at Fairbanks, Alaska, this ..... day of April, 1935.

.....

District Judge

And from the foregoing Findings of Fact, this Court does now make and enter herein the following

CONCLUSIONS OF LAW.

I.

That the order and judgment of the Probate Court, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, made and entered in the above entitled proceeding on the 26th day of October, 1934, fixing and determining the amount of the bond of Alsie M. Young as guardian of the persons of George Houston Cook and Ruth Marion

Cook, minor children of Mayme Helen Young, deceased, at the sum of $3,000.00 and confirming his appointment as such guardian under the last will and testament of said Mayme Helen Young, deceased, and authorizing the issuance to said Alsie M. Young of Letters of Guardianship of the person of each of said children, was regular, valid and legal in all respects and was entirely within the jurisdiction of said Probate Court issuing the same; and that the exceptions of the appellant, Wilhelmina Sumi, filed herein should be denied and disallowed.

Dated at Fairbanks, Alaska, this ..... day of April, 1935.

.....

District Judge

Receipt of a copy of the foregoing Findings of Fact and Conclusions of Law acknowledged April 18th, 1935.

LOUIS K. PRATT
Attorney for Wilhelmina Sumi, Appellant.

[Endorsed]: Lodged Apr 19 1935. N. H. Castle, Clerk, by E. A. Tonseth, Deputy. [103]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF DISTRICT COURT TO TRANSCRIPT OF RECORD REQUESTED BY APPELLEE.

I, Alton G. Nordale, Clerk of the District Court, Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of nine (9) pages, constitutes a full, true and correct transcript of the record on Appeal in cause No. 3806, entitled: In the Matter of the Estate of Mayme Helen Young, Deceased, and was made pursuant to and in accordance with the request of Appellee Alsie M. Young for additions to "Praecipe for Transcript on Appeal", and was made pursuant to and in accordance with said "counter Praecipe" and is the return thereof in accordance therewith, and

I do further certify that the cost of preparing said additions to said Transcript of Record and this certificate, amounting to $1.70, has been paid to me by counsel for Appellee in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 11th day of September, 1935.

[Seal] ALTON G. NORDALE
Clerk of the District Court, Territory of Alaska, Fourth Division,
By E. A. Tonseth,
Chief Deputy. [104]

[Endorsed]: No. 7992. United States Circuit Court of Appeals for the Ninth Circuit. Wilhelmina Sumi, Appellant, vs. Alsie M. Young, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

Filed September 21, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7992

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILHELMINA SUMI,

Appellant,

vs.

ALSIE M. YOUNG,

Appellee.

Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause.]

MOTION TO DISMISS APPEAL.

Comes now appellee, Alsie M. Young, and respectfully moves this Honorable Court to dismiss the appeal herein upon the ground and for the reason that said Court has no jurisdiction to entertain the same, in that:

1. No question arises under or involves the Constitution of the United States of America.

2. No question arises under or involves any statute or treaty of the United States or any authority exercised thereunder.

3. No monetary value, exclusive of interest and costs, exceeding One Thousand Dollars ($1,000.00) is in controversy herein.

4. The appellant herein was not a party in the Probate Court, Fairbanks Precinct, Alaska, where this proceeding originated, and has no standing in this Court.

Points and authorities, together with this motion, will be included under same cover as printed brief for appellee, preceding brief on the merits.

Respectfully submitted,

CECIL H. CLEGG and

JOHN L. McGINN,

Attorneys for Alsie M. Young, Appellee.

Due service of the foregoing Motion to Dismiss Appeal, and receipt of a copy thereof, is acknowledged March 4th, 1936, at Fairbanks, Alaska.

LOUIS K. PRATT,
Attorney for Appellant.

[Endorsed]: Filed Mar. 20, 1936.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Wednesday, April 15, 1936.

Before: WILBUR, GARRECHT and MATHEWS, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED motion of appellee to dismiss appeal and cause on merits argued by Mr. Herman Weinberger, counsel for appellant, and by Mr. Robert W. Jennings, counsel for appellee, and submitted to the court for consideration and decision, with leave to file further briefs 15x15.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Friday, May 8, 1936.

Before: WILBUR, DENMAN and HANEY, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

Before: WILBUR, GARRECHT and MATHEWS, Circuit Judges.

MATHEWS, Circuit Judge:

Appellee filed with the United States Commissioner[1] for Fairbanks Precinct, Territory of Alaska,

---

[1]In Alaska, United States Commissioners are ex-officio probate judges. Act of June 6, 1900, c. 787, §6, 31 Stat. 323, 48 USCA §108; Compiled Laws of Alaska, 1933, §1109.

a verified petition showing that, by the last will of Mayme Helen Young, deceased, appellee had been appointed as testamentary guardian of her two minor children, and praying for confirmation of his appointment and for letters of guardianship. Appellant, the grandmother of the minors, filed a protest, opposing confirmation of appellee's appointment and praying that she herself be appointed as guardian. The Commissioner, after hearing the matter, overruled appellant's protest, and ordered that appellee's appointment be confirmed and that letters of guardianship be issued to him upon his giving bond in the sum of $3,000. On appeal to the District Court[2], the Commissioner's order was affirmed. From the judgment affirming that order, an appeal has been taken to this Court.

Appellee has moved to dismiss the appeal, on the ground that this Court has no jurisdiction thereof. Section 128 of the Judicial Code, as amended by §1 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 USCA §225, provides that this Court shall have appellate jurisdiction to review final decisions in the District Courts for Alaska "in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases

[2]The District Court for Alaska has appellate jurisdiction to review orders, decrees and judgments of United States Commissioners exercising probate jurisdiction. Act of June 6, 1900, c. 786, §§940-943, 31 Stat. 479, 480; Compiled Laws of Alaska, 1933, §§4571-4574.

wherein the value in controversy, exclusive of interest and costs, exceeds $1,000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings;" and shall have appellate and advisory jurisdiction, under §§24 and 25-of the Bankruptcy Act, "over all proceedings, controversies, and cases had or brought in the District Courts [for Alaska] under that Act or any of its amendments."

This, obviously, is not a case "wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved," nor a criminal case, nor a habeas corpus proceeding, nor a proceeding, controversy or case brought under the Bankruptcy Act or any of its amendments. Nor is it a case "wherein the value in controversy, exclusive of interest and costs, exceeds $1,000." There is here no controversy regarding money, property or property rights. The only matter in controversy is the custody of two minor children. The right to such custody cannot be measured in money. There is, therefore, no "value in controversy" on which appellate jurisdiction may be predicated. Barry v. Mercein, 5 How. 103, 119; De Krafft v. Barney, 2 Black 704, 714; In re Burrus, 136 U. S. 586, 595; Leak v. Leak (C. C. A. 9), 156 F. 473, 474. Hence, we conclude, jurisdiction of this appeal is not conferred by §128 of the Judicial Code.

Appellant contends that jurisdiction is conferred by §943 of the Act of June 6, 1900, c. 786, 31 Stat.

480 (Compiled Laws of Alaska, 1933, §4574), which provides that, on appeal from the order of a United States Commissioner exercising probate jurisdiction, the District Court for Alaska or the judge thereof shall determine the issues and "make such order in the premises as he may see fit," and that such order "shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the district court."

Appellant's contention must be rejected. Section 943 does not, of itself, confer or purport to confer any appellate jurisdiction on this court. It merely provides that orders made by the District Court for Alaska in probate cases shall be deemed judgments, subject to appeal in the manner provided for appeals from other judgments of that court. Appeals from other judgments of that court are provided for only in the cases specified in §128 of the Judicial Code. This is not one of those cases. The motion to dismiss must, therefore, be granted.

Appeal dismissed.

[Endorsed]: Opinion. Filed May 8, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7992.

WILHELMINA SUMI,

Appellant,

vs.

ALSIE M. YOUNG,

Appellee.

DECREE OF DISMISSAL

APPEAL from the District Court of the United States for the Territory of Alaska, Fourth Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Territory of Alaska, Fourth Division, and on the Motion of Counsel for the Appellee to Dismiss the Appeal therein, and was duly submitted:

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court, that the said Motion to Dismiss the Appeal in this cause be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for her costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered. May 8, 1936.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, August 17, 1936.

Before: WILBUR, GARRECHT and DENMAN, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellant, filed June 6, 1936, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Herman Weinberger, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including October 1, 1936; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT,
United States Circuit Judge.

Dated: San Francisco, California,
August 20, 1936.

[Endorsed]: Filed Aug. 20, 1936.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred thirty-five (135) pages, numbered from and including 1 to and including 135, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 14th day of September A. D. 1936.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 9, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8503-C)

FILE COPY

FILED
SEP 28 1936
CHARLES ELMORE CROP
CLER

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

No. 406

WILHELMINA SUMI,
Petitioner,

vs.

ALSIE M. YOUNG,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

HERMAN WEINBERGER,
San Francisco, California,
Attorney for Petitioner.

LOUIS K. PRATT,
Fairbanks, Alaska,
Of Counsel for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No.

WILHELMINA SUMI,
Petitioner,

vs.

ALSIE M. YOUNG,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petition of Wilhelmina Sumi for a Writ of Certiorari, directed to the United States Circuit Court of Appeals for the Ninth Circuit, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Mayme Helen Young, a resident of Fairbanks, Alaska, died there testate (her husband having predeceased her) leaving her surviving two minor children by a former marriage, George Huston Cook (9) and Ruth Marion Cook (8). (R. 2.) By her Will she nominated and appointed Respondent, Alsie M. Young (brother of her deceased husband but a stranger to the minor children), as Guardian of the children. (R. 3.)

Respondent, a resident of Michigan, petitioned the Probate Court*, Fairbanks Precinct, Alaska, that his Bond be fixed and Letters of Guardianship issue to him. (R. 1.)

Wilhelmina Sumi, Petitioner herein, a resident of Fairbanks, maternal grandmother of the minors, filed in the Probate Court a "Protest and Petition" (R. 7 and 16) setting forth her objections to the confirmation of the testamentary appointment of Respondent, and petitioning for her own appointment as their Guardian. This the Probate Court denied (R. 21), and appointed Respondent as Guardian of the persons of the minors. (R. 25.) Petitioner appealed to the District Court, Fourth Division of Alaska. (R. 26.) In accordance with the Statute (Sections 4573 and 4574, Compiled Laws of Alaska 1933) a trial *de novo* was had. (R. 36 and 37.) The District Court

*In Alaska, United States Commissioners are ex-officio probate judges. Act of June 6, 1900, c. 786, Section 6, 31 Stat. 323, 48 U. S. C. A. Section 108; Compiled Laws of Alaska 1933, Section 1109.

sustained the Probate Court (R. 37) and Petitioner appealed from its judgment to the Circuit Court of Appeals for the Ninth Circuit. (R. 55 and 60.)

In the Circuit Court of Appeals, Respondent filed a "Motion to Dismiss the Appeal" (R. 127) on the ground that the Court did not have jurisdiction to hear it, contending that jurisdiction is conferred on the Circuit Court of Appeals only in specified cases as set forth in Section 128 of the Judicial Code, as amended by Section 1 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. A. Section 225, and that this is not one of those cases. To this Motion, Petitioner filed her opposition upon the ground that the Circuit Court of Appeals has jurisdiction not only by Section 128 of the Judicial Code, but specifically has it under Section 943 of the Act of June 6, 1900, c. 786, 31 Stat. 480, being the Compiled Laws of Alaska 1933 (Code of Civil Procedure), Section 4574. (See Opinion of Court, R. 131.) The Court granted the Motion to Dismiss the Appeal (R. 133), thereby making the District Court of Alaska, the Court of last resort. If there is no appeal from the District Court in a case of this character, a question is presented of vital importance to all of the people of Alaska.

B.

REASONS FOR GRANTING THE WRIT.

(a) The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, namely: Does Section 128 of the Judicial Code, as amended, exclusively confer appellate jurisdiction on the Circuit Court of Appeals in cases decided by the District Court of Alaska, or does not Section 4574 (Code of Civil Procedure), Compiled Laws of Alaska 1933, Section 943 of the Act of June 6, 1900, c. 786, 31 Stat. 480, which is also an Act of Congress, and which has not been repealed, supplement that jurisdiction and confer appellate jurisdiction by its own terms.

(b) That the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, for the reason that in an early case decided by Judge Wickersham sitting in the District Court of Alaska (*In re McCarty's Estate,* 3 Alaska 242-248) he stated that an appeal did lie to the Circuit Court of Appeals under Section 943 (supra).

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and to mail to this Court, for its review and determination, on a day certain to be named therein, a full and complete Transcript of all the proceedings in this case, numbered

on the docket of said Court No. 7992; that judgment therein may be reversed by this Honorable Court; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
September 23, 1936.

HERMAN WEINBERGER,
Attorney for Petitioner.

LOUIS K. PRATT,
of Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am Attorney for the Petitioner in the above entitled case, and that in my judgment the foregoing Petition is well founded in law and fact, and that said Petition is not interposed for delay.

Dated, San Francisco, California,
September 23, 1936.

HERMAN WEINBERGER,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No.

WILHELMINA SUMI,
Petitioner,

vs.

ALSIE M. YOUNG,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINION OF THE COURT BELOW.

The Opinion of the Circuit Court of Appeals for the Ninth Circuit is set forth in the Record, pages 129 to 133, and in the Appendix, pages i to iv. It is reported in 83 Fed. (2d) 752.

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, ch. 229, Section 1, 43 Stat. 936.

C.

STATEMENT OF THE CASE.

This has been fully covered under "SUMMARY STATEMENT OF THE MATTER INVOLVED" in the Petition for Writ of Certiorari herein, and in the interest of brevity that statement is not repeated here.

D.

SPECIFICATION OF ERRORS TO BE URGED.

The following are assigned as errors in connection with the judgment of the Circuit Court of Appeals (R. 131) (83 Fed. (2d) 752):

1. The Circuit Court of Appeals erred in holding that Section 128 of the Judicial Code exclusively confers jurisdiction on it in connection with judgments entered in the District Court of Alaska.

2. The Circuit Court of Appeals erred in stating that the appellate jurisdiction of the District Court of Alaska with reference to judgments of the Probate Courts of Alaska is to "review" these judgments and in failing to state that the jurisdiction is more com-

prehensive than mere review and extends to the trial of such cases *de novo*.

3. The Circuit Court of Appeals erred in holding that the instant case is not one wherein a statute of the United States is involved.

4. The Circuit Court of Appeals erred in holding that Section 943 of the Act of June 6, 1900 c. 786, 31 Stat. 480 (Compiled Laws of Alaska 1933, Sec. 4574) does not confer appellate jurisdiction on it in the instant case, although the Section by its very terms purports to do so.

E.

SUMMARY OF ARGUMENT.

The Circuit Court of Appeals for the Ninth Circuit does not obtain exclusively from Section 128 of the Judicial Code its appellate jurisdiction as to judgments entered in the District Court of Alaska. This is shown to be true historically, by reference to the dates of various enactments, including the Act of June 6, 1900 (31 Stat. 321), being the Code of Civil Procedure of Alaska, as enacted by Congress. This Code contained a complete system of appellate procedure. When the Judicial Code was enacted March 3, 1911, many sections of the Code of Civil Procedure of Alaska were amended and, as amended, were carried into the Judicial Code. But other sections, particularly those covering appeals in special proceedings, such as Writs of Review, Mandamus, Contempt and Probate Cases, were not amended nor carried into the

Judicial Code, nor were they repealed. The appeal in the instant case is authorized by the last designated section, to-wit: "Appeals in Probate Cases", Section 943 of the Act of June 6, 1900, now Section 4574, Compiled Laws of Alaska 1933. This Section, since its enactment, has been and now is in full force and effect; is an Act of Congress of equal dignity with the Judicial Code, and supplements the jurisdiction of the Circuit Court of Appeals as provided for in the Judicial Code. It provides for appeals "in the manner provided for appeals from judgments in the District Court". The Circuit Court of Appeals overlooked entirely the words "in the manner", and held that appealable judgments of the District Court are provided for only in Section 128 of the Judicial Code, thus nullifying the statute and making the District Court of Alaska, the Court of last resort in the instant case.

Not only does the Circuit Court of Appeals have jurisdiction under the specific section of the Code of Civil Procedure of Alaska just mentioned, but it has jurisdiction also under Section 128 of the Judicial Code itself, for the reason that the interpretation and construction of a statute of the United States is involved. The Circuit Court of Appeals did not always have this jurisdiction. It was acquired by the amendment of February 13, 1925. The Code of Civil Procedure of Alaska is a statute of the United States. A consideration of the instant case on its merits requires the construction and interpretation of several sections of the Code relating to Guardianship, and where the interpretation and construction of Sections of a stat-

ute of the United States are called into the question, the Circuit Court of Appeals has jurisdiction.

Therefore, the Court was in error in granting the Motion to Dismiss the Appeal in the instant case, and its judgment should be reversed.

F.

ARGUMENT.

I. SECTION 128 OF THE JUDICIAL CODE* DOES NOT EXCLUSIVELY CONFER APPELLATE JURISDICTION ON THE CIRCUIT COURT OF APPEALS AS TO JUDGMENTS ENTERED IN THE DISTRICT COURT OF ALASKA.

(a) Historically.

May 17, 1884. Alaska was first constituted a civil and judicial district by act of Congress. (23 Stat. L. chap. 53.) District Courts were established. The general laws of the State of Oregon then in force were declared to be the laws of the District. Writs of Error and Appeal were provided for to the Circuit Court for the District of Oregon and to the Supreme Court of the United States.

March 3, 1891. The Circuit Court of Appeals was created by the Act of this date (26 Stat. 826) with limited appellate jurisdiction to review by Appeal or Writ of Error the final decisions in the District Courts and Circuit Courts. No specific mention was made of the District of Alaska.

June 6, 1900. Congress enacted the Code of Civil Procedure of Alaska (31 Stat. 321) containing sec-

*Section 128 of the Judicial Code, as originally enacted; as amended February 13, 1925; May 20, 1926; April 11, 1928, and May 31, 1935, will be found in the Appendix, pages iv to viii.

tions constituting complete appellate procedure. The Code was mainly copied from the Statutes of Oregon, then in effect, but not entirely so. (Introduction to Carter's Annotated Alaska Code.) Provision was made for Appeals and Writs of Error from the District Courts of Alaska to the United States Supreme Court in certain specified cases, and to the Circuit Court of Appeals for the Ninth Circuit in all other cases where the amount involved or the value of the subject matter exceeded five hundred dollars. (Secs. 504 to 508, Carter's Codes, 31 Stat. 414.) And provision was also made for review by the Circuit Court of Appeals in certain special proceedings, including Writs of Review (Sec. 551 Carter's Codes, 31 Stat. 421), Mandamus (Sec. 565, Carter's Codes, 31 Stat. 422), Habeas Corpus (Sec. 608, Carter's Codes, 31 Stat. 429), Contempt (Sec. 623, Carter's Codes, 31 Stat. 431), *Appeals in Probate Cases.** (Sec. 943, Carter's Codes, 31 Stat. 480.)

March 3, 1911. Congress enacted the Judicial Code. (Stat. 1910-1911, p. 1087.) Certain sections of the Alaska Code governing Appeals and Writs of Error were amended and carried into the Judicial Code, as amended. Section 504 of the Alaska Code of Civil Procedure (Carter's Code, Sec. 504, 31 Stat. 414) became Section 247 of the Judicial Code. (36 Stat. L. 1158.) Section 505 of the Alaska Code of Civil Procedure (Carter's Codes, Sec. 505, 31 Stat. 414) was amended, and, as amended, carried into the Judicial Code as Section 134. (36 Stat. L. 1134.) (Both of these Sections, 247 and 134, were repealed by the

*All italics ours.

amendment of the Judicial Code by the Act of February 13, 1925, 43 Stat. 936.) The other appellate provisions in the Alaska Code, including those governing the *special proceedings,* enumerated above, were not amended nor carried into the Judicial Code, nor were they repealed. *They remained in full force and effect as a part of the Code of Civil Procedure of Alaska.* No specific mention was made of Alaska in Section 128 of the Judicial Code where the general jurisdictional powers of the Circuit Court of Appeals are found.

The "Repealing Provisions" of the Judicial Code are set forth in Section 297 thereof. (Stat. 1910-1911, p. 1168, chap. 14.) These are lengthy and specific, but they do not, either directly or indirectly, repeal any part of the previous Act of Congress which constitutes the Alaska Code of Civil Procedure (31 Stat. 321) and as stated before, they do not repeal any of the Sections of that Code covering the *special proceedings* above enumerated.

February 13, 1925. Congress amended the Judicial Code. (43 Stat. 936.) It amended Section 128 and reenacted it as amended.*

An important addition to the jurisdiction of the Circuit Court of Appeals was made by this amendment. Whereas theretofore the Supreme Court had been vested with appellate jurisdiction to review the final judgments of the District Court of Alaska

> "in all cases which involve the construction or application of the Constitution of the United

*Appendix, p. v.

> States, or in which the constitutionality of any law of the United States * * * is drawn in question"

by this amendment, the Circuit Court of Appeals was given appellate jurisdiction to review final decisions in the District Court of Alaska

> "in all cases, civil and criminal, wherein the Constitution or *a statute* or treaty of the United States * * * is involved."

By the Act of February 13, 1925, various statutes and parts of statutes again were repealed (43 Stat. 941), and although portions of the Hawaiian Act, of the Canal Zone Act, and others were specifically mentioned and repealed, again *there was no mention, and no repeal of those sections of the Alaska Code dealing with Mandamus, Contempt, Writs of Review or Appeals in Probate Cases.* The subject of Habeas Corpus was covered in Section 128 of the Judicial Code, but none of the others was mentioned and none of the other sections is repealed expressly or by implication.

(b) The Judicial Code does not purport to contain all of the statutory law.

This was recognized and stated by this Court in *Street & Smith v. Atlas Mfg. Co.*, 231 U. S. 348, wherein the Court said:

> "*The Code does not purport to embody all the law* upon the subjects to which it relates. It contains some new provisions and some that are modifications of old ones; but much of it is merely a reenactment of prior laws with appropriate re-

gard to their proper classification and orderly arrangement."

That Section 128 of the Judicial Code is not all-inclusive of the jurisdiction of the Circuit Court of Appeals and does not exclusively confer jurisdiction on that Court, is evident from the jurisdiction given the Court (exclusively) to review: (a) Decisions of the Board of Tax Appeals (44 Stat. 110); (b) Orders of the Federal Trade Commission under Section 9 of the Securities Act of 1933; and (c) Awards of the Commissioners in Condemnation Proceedings under Section 24 of the Tennessee Valley Authority Act.

This additional jurisdiction was not conferred by amending Section 128 of the Judicial Code. If this Section exclusively conferred jurisdiction on the Circuit Court of Appeals, it is clear that additional jurisdiction could be added only by amending such Section. There are other laws which supplement the jurisdiction conferred by Section 128.

If Congress had intended that the appellate jurisdiction of the Circuit Court of Appeals with reference to Alaska should be derived exclusively from Section 128, as amended in 1925, it could have used definite and certain language to signify such intention.

Such language manifestly would have repealed by implication previous enactments of Congress covering the same subject matter.

The various Sections of the Alaska Code covering Writs of Review, Mandamus, Contempt and Appeals in Probate cases are such previous enactments.

And yet, in the Opinion in the instant case (Appendix p. i) the Court holds that appeals from judgments of the District Court of Alaska

> "are provided for *only* in the cases specified in Section 128 of the Judicial Code."

Thus, all of the provisions of the Alaska Code with reference to appeal in the various matters hereinbefore mentioned, are at once nullified by the Court.

II. THE APPEAL IN THIS CASE IS SPECIFICALLY AUTHORIZED BY SECTION 943 OF THE ACT OF JUNE 6, 1900, c. 786, 31 STAT. 480 (Section 943 Carter's Annotated Codes; Section 1775 Compiled Laws of Alaska 1913; Section 4574 Compiled Laws of Alaska 1933).

(a) This Section has never been amended nor repealed.

Since the enactment of this Section, which is part of the chapter on "Appeal in Probate Cases", its provisions have remained the same, as follows:

> *"Sec. 4574. Proceedings in such cases.* Upon such hearing the District Court or judge thereof shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit, which order shall be entered in a docket to be kept by the clerk of the court for that purpose, properly indexed, and a copy of the same shall be forwarded to the commissioner before whom the exceptions were filed, who shall thereupon proceed in accordance with such order. *Such orders shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court."*

The italicized language is similar to that used in those Sections of the Oregon Code which became a part of the Alaska Code, to-wit:

Oregon		Alaska
Section 611 L. O. L.	Writ of Review	Section 4111 C. L. A. (1933)
Section 626 L. O. L.	Mandamus	Section 4128 C. L. A. (1933)
Section 669 L. O. L.	Habeas Corpus	Section 4177 C. L. A. (1933)
Section 684 L. O. L.	Contempt	Section 4196 C. L. A. (1933)

In these Sections, the provision with reference to appeal is as follows:

WRITS OF REVIEW.

31 Stat. 421;
Sec. 551 Carter's Codes;
Sec. 1383 C. L. A. 1913;
Sec. 4111 C. L. A. 1933.

"From a judgment of the District Court on review an appeal may be taken *in like manner and with like effect as from a judgment of such District Court in an action.*"

MANDAMUS.

31 Stat. 422;
Sec. 565 Carter's Codes;
Sec. 1397 C. L. A. 1913;
Sec. 4128 C. L. A. 1933.

"From a judgment of the District Court, or judge thereof, refusing to allow a mandamus, or directing a peremptory mandamus, an appeal may be taken *in like manner and with like effect as in an action.*"

HABEAS CORPUS.

31 Stat. 429;
Sec. 608 Carter's Codes;
Sec. 1440 C. L. A. 1913;
Sec. 4177 C. L. A. 1933.

"Any party to a proceeding by habeas corpus, * * * may appeal from the judgment of the District Court * * * *in like manner and with like effect as in an action.*"

CONTEMPT.

31 Stat. 431;
Sec. 623 Carter's Codes;
Sec. 1455 C. L. A. 1913;
Sec. 4196 C. L. A. 1933.

"Either party to a judgment in a proceeding for contempt may appeal therefrom *in like manner and with like effect as from a judgment in an action.*"

The similarity of the language with that used in Section 4574, Appeal in Probate Cases, supra, should be noted:

"Such orders shall be deemed a judgment, subject to appeal *in the manner* provided for appeals from judgments in the District Court."

In its Opinion in the instant case (Appendix, p. i) the Circuit Court of Appeals entirely overlooked the words "in the manner". The Court says:

"Section 943 (C. L. A. 1933 Section 4574) does not, of itself, confer or purport to confer any appellate jurisdiction on this court. It merely provides that orders made by the District Court for Alaska in probate cases shall be deemed judgments, subject to appeal in the manner provided for appeals from other judgments of that court. *Appeals from other judgments of that court are provided for only in the cases specified in Section 128 of the Judicial Code. This is not one of those cases.*"

We submit that the words of Section 4574 C. L. A. 1933, to-wit:

"shall be deemed a judgment, subject to appeal"

mean that a judgment "subject to appeal" is an appealable judgment. These words create an appealable judgment and confer the *right* to appeal.

The words:

"in the manner provided for appeals from (other) judgments in the District Court"

refer solely to the *manner or mode* of taking and perfecting such an appeal.

The *right* to appeal from certain "other" judgments is specifically given in Section 128 of the Judicial Code, but is not solely given there.

The *right* to appeal from this judgment is specifically given in Section 4574 C. L. A. 1933. These rights are not in conflict—they are complementary.

The *manner or mode* of taking and perfecting an appeal from appealable judgments (not only from those made appealable by Section 128 of the Judicial Code but also from those made appealable by Section 4574 C. L. A. 1933 and other Sections of the Alaska Code) is not provided for in Section 128 of the Judicial Code. The *manner or mode* is set forth in other statutes and in the Rules of Court. The *manner or mode* of taking and perfecting an appeal embraces several steps.

We respectfully urge, therefore, that to say (as does the Opinion of the Circuit Court of Appeals in the

instant case) that an order of the District Court is a judgment

> "subject to appeal in the manner provided for appeals from other judgments of that Court"

and then to say that such judgment cannot be appealed because it is not one of those "other" judgments, is to render meaningless the very words of the statute itself that such judgment is "subject to appeal".

(b) What is meant by the words "in the manner".

The ordinarily accepted meaning of the word "manner" is given by Webster as:

> "Mode of action; way of performing or effecting anything; method; style; form or fashion."

Century Dictionary defines it as follows:

> "The way in which an action is performed; method of doing anything; mode of proceeding in any case of situation; mode; way; method."

The words "in the manner" have often received judicial interpretation.

Perhaps the most illuminating statement for our purposes is that made by the Supreme Court of Oregon, in *Turner v. Hendryx,* 169 Pac. 109. This case is particularly instructive and compelling because most of the Code Sections of Alaska were lifted bodily from the Oregon law. This case involved the custody of a child whose father was attempting by habeas corpus proceedings to obtain possession of it from third parties with whom it had been left after the death of its mother. The lower Court refused to grant the writ,

and the question on appeal was whether the Supreme Court of Oregon had the right to review the matter *de novo*. The statute (Section 669 L. O. L.) was as follows:

> "Any party to a proceeding by habeas corpus, * * * may appeal from the judgment of the circuit or county court refusing to allow such writ or any final judgment therein * * * *in like manner* and with like effect as in an action."

In the concurring opinion the Court says:

> "The statute prescribes that a party to a proceeding by habeas corpus may appeal *'in a like manner and with like effect as in an action'*. The word *'manner' means the way of performing anything; the mode in which an act shall be done; the way of doing a thing; the method of procedure.* 25 Cyc. 516; Livesly v. Litchfield, 47 Or. 248, 255, 83 Pac. 142, 114 Am. St. Rep. 920. When the statute says that an appeal in a proceeding by habeas corpus shall be *'in like manner* * * * as in an action', it means that the *mode of appealing is the same as the mode of appealing in an action at law;* and this is only one way of saying that the method of procedure prescribed for appeals in suits in equity cannot be followed when a party appeals from a judgment in a proceeding by habeas corpus. 5 Words and Phrases, 4159, 4161."

> "* * * if in the instant case we try the cause de novo, we do so on evidence which is brought here *in the manner* prescribed for appeals from decrees; and in my opinion this is in direct violation of section 669 L. O. L., which commands that the appeal shall be *'in like manner and with*

like effect as in an action'. The statute fixes the mode, and the mode so fixed is the measure of the right to appeal."

We urge, therefore, that Section 4574 C. L. A. 1933, authorizes this appeal to the Circuit Court of Appeals, and must be interpreted as if it read this way:

"An order of the District Court made in a probate case on appeal to it, shall be deemed a judgment. Such judgment is appealable. The manner or mode of taking and perfecting such appeal shall be the same manner or mode which is provided for the taking and perfecting of an appeal from other appealable judgments made and entered in the District Court."

III. THE EFFECT OF THE COURT'S DECISION IN THE INSTANT CASE IS TO TAKE AWAY THE RIGHT OF APPEAL IN PROBATE CASES.

(a) Congress did not intend the District Court in Alaska, trying a probate case de novo, to be a Court of last resort.

The District Court of Alaska is more than an Appellate Court in probate matters. In the Opinion in the instant case, in footnote No. 2 (Appendix p. ii) the Circuit Court of Appeals says:

"The District Court for Alaska has *appellate* jurisdiction to *review* orders, decrees and judgments of United States Commissioners exercising probate jurisdiction."

The Sections of the law cited in support of this statement, i. e., Sections 4571-4574 C. L. A. 1933, by their very language, give that Court a more comprehensive

jurisdiction than merely "to review". These Sections provide:

> "Upon the filing of such exceptions the District Judge shall proceed on due notice to *hear and determine* the same *at such time and in such manner* as he shall prescribe by order, and *for that purpose may receive and entertain affidavits and depositions or hear oral evidence.*" (Section 4573 C. L. A. 1933.)
>
> "Upon such hearing the District Court or judge thereof shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit. * * *" (Section 4574 C. L. A. 1933.)

The District Court therefore tries the case *de novo*. The Judge hears oral evidence, determines issues on their merits, and makes "such order in the premises as he may see fit". The Court does more than merely "review" the orders of the Commissioner sitting as a Probate Judge. If there were no appeal from the District Court's decision there would be innumerable and very important, far-reaching probate decisions not subject to any review. No such power is given the District Judge. His judgments are by the very words of the statute *"subject to appeal"*.

This was the opinion of *Judge Wickersham*, when sitting on the District Bench of Alaska. In the case *In re McCarty's Estate*, 3 Alaska 242, at 248, he was considering the question of the proper distribution of an estate. He disagreed with the order of distribution made by the Probate Court (the Commissioner). He said:

> "Chapter 90 of the Code of Civil Procedure of Alaska provides the method for taking appeals from the final orders and judgments of the probate courts to the district court. Section 943 therein provides that upon hearing the appeal the district court or judge thereof 'shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit'. The district court must, of course, determine the issues within the statute and those equitable rules of practice and procedure commonly applicable to such cases. This section further provides that a copy of the judgment of this court shall be forwarded to the probate judge below, who shall thereupon proceed in accordance with such order. *Such order of this court shall be deemed a judgment, from which an appeal will lie to the Circuit Court of Appeals in the manner provided for taking appeals from other judgments of the district court.*"

Here is a direct statement by a Judge whose life and judicial experience paralleled the introduction of the Codes into Alaskan jurisprudence and who, in Alaska, interpreted the very Section of its Code under consideration in the instant case, saying that under the Section "*an appeal will lie to the Circuit Court of Appeals in the manner provided for taking appeals from other judgments of the District Court.*"

IV. THE CIRCUIT COURT OF APPEALS HAS JURISDICTION NOT ONLY UNDER SECTION 4574 C. L. A. 1933, BUT ALSO UNDER SECTION 128 OF THE JUDICIAL CODE ITSELF, BECAUSE THE INTERPRETATION AND CONSTRUCTION OF A STATUTE OF THE UNITED STATES IS INVOLVED.

The Court in its Opinion (Appendix p. ii) says:

> "This, obviously, is not a case 'wherein the Constitution *or a statute* or treaty of the United States or any authority exercised thereunder is involved' * * * *."

We have pointed out (page 14 this Brief) that by the amendment of February 13, 1925, to Section 128 of the Judicial Code, the Circuit Court of Appeals was invested with appellate jurisdiction to review final decisions in the District Court of Alaska in all cases wherein a statute of the United States is involved.

We contend that a determination of this case on its merits involves the interpretation and application of several Sections of the Alaska Code of Civil Procedure, and that this Code, enacted by Congress as 31 Stat. 321, is a statute of the United States. It is true it was enacted for the government of the Territory of Alaska, but this does not make it any the less a statute of the United States. (*Asiatic Petroleum Co. v. Insular Collector of Customs, U. S. Sup. Co.* [Law. Ed.], Vol. 80, Advance Opinion No. 12, p. 620.) As a matter of fact this Court, itself, has referred to the Alaska Code as being "The Act of Congress." *Waskey v. Chambers*, 224 U. S. 564 at 565.

The case at bar is vitally concerned with the construction and interpretation of five Sections of the

statute, i. e., Sections 4510, 4513, 4514, 4515 and 4516 C. L. A. 1933. For convenience of reference the pertinent parts of these Sections are set forth in the Appendix, pages ix to xii.

This case on its merits involves the validity in Alaska of the appointment of a testamentary guardian of the *persons only* of two minors.

We contend: That under Alaska law there is no authority whatever for the appointment of a guardian of the person only of a minor; that such appointment must be of the person *and* estate; that a guardian who is not empowered to take charge of a minor's estate does not have any right to the care, custody and tuition of such minor; that the lower Courts (Commissioner and District Court) rejected the application of Appellant herein, the grandmother of the minors, to be appointed guardian of the *person and estate* of said minors, and confirmed the appointment of Appellee as guardian of the *person only* (R. 24-25); that the validity of such appointment is directly in issue.

It is our contention that such appointment under the laws of Alaska is void. This question has been properly saved for review in the Circuit Court of Appeals (R. 53 and 59) and is properly before that Court.

The rule that the guardian must be of the *person and estate* of a minor and not merely of the person alone, is not peculiar to Alaska.

As the Court in a New Jersey case, *Tenbrook v. McColm*, 12 N. J. Law 97, said:

> "From a separation of these duties, while very little benefit can be anticipated, many inconveniences and considerable increase of expense must necessarily follow. The policy of our laws is wisely designed to prevent such consequences. From a careful review of the acts of the legislature on this subject * * * *I am satisfied the orphans' courts are not authorized to divide the guardianship of a minor, and commit his property to one and his person to another.*"

Of course, in many jurisdictions the law has been changed, *but it has not been changed in Alaska*, and a reading together of all the Sections with reference to guardianship leads to the inescapable conclusion that there is no warrant or authority under the law of Alaska for the appointment of a guardian by the Commissioner, or by last will and testament, who shall be guardian *only* of the *person* of a minor, and that the confirmation of such attempted appointment is void and of no effect.

A determination of the validity of such order and judgment involves an interpretation and construction of a number of Sections of a statute of the United States. It could never have been intended that the District Court of Alaska should be the Court of last resort in the interpretation and construction of statutes of the United States. In this matter, the District Court of Alaska is to all intents and purposes a *nisi prius* Court trying a probate case *de novo*. Its judg-

ment is subject to review in the Circuit Court of Appeals.

Therefore, jurisdiction is vested in the Circuit Court of Appeals in the instant case not only under the specific provisions of Section 4574 C. L. A. 1933, which in and of itself directly authorizes the appeal, but also under Section 128 of the Judicial Code, which gives that Court appellate jurisdiction where the construction and interpretation of a statute of the United States is involved.

V. REVIEW OF CASES CITED BY CIRCUIT COURT OF APPEALS IN SUPPORT OF ITS OPINION.

In support of its conclusion that it has no jurisdiction to review the instant case, the Circuit Court of Appeals in its Opinion cites and relies on four cases, which hold generally that the custody of minors involves no "value in controversy" upon which appellate jurisdiction may be predicated, to-wit: *Barry v. Mercein,* 5 How. 103, 119; *DeKrafft v. Barney,* 2 Black 704, 714; *In re Burrus,* 136 U. S. 586, 595; *Leak v. Leak* (C. C. A. 9), 156 F. 473, 474.

We have no quarrel with this ruling, nor with these decisions. We are not relying on any amount or "value in controversy" in the instant case. We are relying on (a) Section 128, as amended, of the Judicial Code, because a statute of the United States is involved, namely, many Sections of the Code of Civil Procedure of Alaska, 31 Stat. 321; and, (b) a specific

unrepealed Section of the Code of Civil Procedure of Alaska (31 Stat. 480), i. e., Section 4574 C. L. A. 1933, which, by its very terms, authorizes this appeal to the Circuit Court of Appeals.

Furthermore, we desire to point out that when the Circuit Court of Appeals decided the case of *Leak v. Leak* (1907), supra, the Court was not possessed of jurisdiction to hear and determine a case wherein a statute of the United States was involved. That right was given by the amendment to the Judicial Code, Section 128, in 1925.*

Furthermore, a portion of the Opinion of Judge Gilbert in the *Leak* case was purely dictum. The Court was dealing with the question of the care and custody of minors in a divorce action, and said that the Court did not have jurisdiction to hear the appeal because Section 504 of Carter's Codes (the Judicial Code had not yet been enacted) provided for appeals to the Circuit Court of Appeals.

> "in civil causes only in cases where the amount involved, or the value of the subject-matter, exceeds $500."

This, of course, was correct, and upon it the Court rejected jurisdiction of the appeal so far as it concerned the question of the custody of the minors, that is, whether they should go to the one or the other of the divorced parties. But after having decided the case, the Court continued and added:

*Appendix p. v.

> "There is no statutory provision for appeal in cases where the value of the subject-matter of the controversy cannot be measured in money."

In making this statement, the Court overlooked entirely those provisions in the Alaska Code which specifically, and in and of themselves, give the right of appeal without reference to the "value of the subject-matter of the controversy", i. e., Writs of Review, Mandamus, Habeas Corpus, Contempt and Appeals in Probate Cases. Obviously, the Court did not have any of these matters in mind, and its generalized statement, not necessary to the decision of the case it was then considering, cannot be cited as authority in the instant case.

VI. SUMMARY.

We contend: That the Circuit Court of Appeals has jurisdiction in the instant case to hear the appeal from the judgment of the District Court of the District of Alaska, (a) under the provisions of Section 128, as amended, of the Judicial Code, for the reason that a statute of the United States (31 Stat. 321), to-wit, the Code of Civil Procedure of Alaska and the interpretation of several sections of that Code, are involved; and (b) under the specific provision of Section 943 of the Act of June 6, 1900, c. 786, 31 Stat. 480. (Section 943 Carter's Annotated Codes; Section 1775 C. L. A. 1913; Section 4574 C. L. A. 1933); that the Circuit Court of Appeals erred in rejecting the jurisdiction; and that

a Writ of Certiorari should be issued so that its judgment herein may be reversed by this Honorable Court.

Dated, San Francisco, California,
September 23, 1936.

Respectfully submitted,
HERMAN WEINBERGER,
Attorney for Petitioner.

LOUIS K. PRATT,
Of Counsel for Petitioner.

(Appendix Follows.)

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Appendix

In the United States Circuit Court of Appeals for the Ninth Circuit

WILHELMINA SUMI, Appellant, vs. ALSIE M. YOUNG, Appellee.	No. 7992 May 8, 1936

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

Before: WILBUR, GARRECHT and MATHEWS, Circuit Judges.

MATHEWS, Circuit Judge:

Appellee filed with the United States Commissioner[1] for Fairbanks Precinct, Territory of Alaska, a verified petition showing that, by the last will of Mayme Helen Young, deceased, appellee had been appointed as testamentary guardian of her two minor children, and praying for confirmation of his appointment and for letters of guardianship. Appellant, the grandmother of the minors, filed a protest, opposing confirmation of appellee's appointment and praying that she herself be appointed as guardian. The Commissioner, after hearing the matter, overruled appellant's protest, and ordered that appellee's appointment be con-

1. In Alaska, United States Commissioners are ex-officio probate judges. Act of June 6, 1900, c. 786, Section 6, 31 Stat. 323, 48 U. S. C. A. Section 108; Compiled Laws of Alaska, 1933, Section 1109.

firmed and that letters of guardianship be issued to him upon his giving bond in the sum of $3000. On appeal to the District Court,[2] the Commissioner's order was affirmed. From the judgment affirming that order, an appeal has been taken to this Court.

Appellee has moved to dismiss the appeal, on the ground that this Court has no jurisdiction thereof. Section 128 of the Judicial Code, as amended by Section 1 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. A. Section 225, provides that this Court shall have appellate jurisdiction to review final decisions in the District Courts for Alaska "in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings"; and shall have appellate and advisory jurisdiction, under Sections 24 and 25 of the Bankruptcy Act, "over all proceedings, controversies, and cases had or brought in the District Courts (for Alaska) under that Act or any of its amendments".

This, obviously, is not a case "wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved", nor a criminal case, nor a habeas corpus proceeding, nor a

2. The District Court for Alaska has appellate jurisdiction to review orders, decrees and judgments of United States Commissioners exercising probate jurisdiction. Act of June 6, 1900, c. 786, Sections 940-943, 31 Stat. 479, 480; Compiled Laws of Alaska, 1933, Sections 4571-4574.

proceeding, controversy or case brought under the Bankruptcy Act or any of its amendments. Nor is it a case "wherein the value in controversy, exclusive of interest and costs, exceeds $1000". There is here no controversy regarding money, property or property rights. The only matter in controversy is the custody of two minor children. The right to such custody cannot be measured in money. There is, therefore, no "value in controversy" on which appellate jurisdiction may be predicated. *Barry v. Mercein*, 5 How. 103, 119; *DeKrafft v. Barney*, 2 Black 704, 714; *In re Burrus*, 136 U. S. 586, 595; *Leak v. Leak* (C. C. A. 9), 156 F. 473, 474. Hence, we conclude, jurisdiction of this appeal is not conferred by Section 128 of the Judicial Code.

Appellant contends that jurisdiction is conferred by Section 943 of the Act of June 6, 1900, c. 786, 31 Stat. 480 (Compiled Laws of Alaska, 1933, Section 4574), which provides that, on appeal from the order of a United States Commissioner exercising probate jurisdiction, the District Court for Alaska or the judge thereof shall determine the issues and "make such order in the premises as he may see fit", and that such order "shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court".

Appellant's contention must be rejected. Section 943 does not, of itself, confer or purport to confer any appellate jurisdiction on this Court. It merely provides that orders made by the District Court for Alaska in probate cases shall be deemed judgments,

subject to appeal in the manner provided for appeals from other judgments of that Court. Appeals from other judgments of that Court are provided for only in the cases specified in Section 128 of the Judicial Code. This is not one of those cases. The motion to dismiss must, therefore, be granted.

Appeal dismissed.

(Endorsed:) Opinion. Filed May 8, 1936. Paul P. O'Brien, Clerk.

JUDICIAL CODE, SECTION 128, PRIOR TO AMENDMENT OF FEBRUARY 13, 1925.

Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

JUDICIAL CODE, SECTION 128, AS AMENDED FEBRUARY 13, 1925.

(Judicial Code, section 128, amended.) Appellate jurisdiction—

(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

Second. In the United States district courts for Hawaii and for Porto Rico in all cases.

Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in sections 1307, 1324, 1336 and 1341 to 1357 of Title 48.

Fourth. In the Supreme Court of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and

costs, exceeds $5000, and in all habeas corpus proceedings.

Fifth. In the United States Court for China, in all cases.

(b) *Review of interlocutory orders or decrees of district courts.* The circuit court of appeals shall also have appellate jurisdiction—

First. To review the interlocutory orders or decrees of the district courts which are specified in section 227 of this title.

Second. To review decisions of the district courts sustaining or overruling exceptions to awards in arbitrations, as provided in sections 117 to 121 of Title 15.

(c) *Appellate and supervisory jurisdiction in bankruptcy proceedings.* The circuit courts of appeals shall also have an appellate and supervisory jurisdiction under sections 47 and 48 of Title 11, over all proceedings, controversies, and cases had or brought in the district courts under Title 11, relating to bankruptcy, or any of its amendments, and shall exercise the same in the manner prescribed in those sections; and the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit in this regard shall cover the courts of bankruptcy in Alaska and Hawaii, and that of the Circuit Court of Appeals for the First Circuit shall cover the court of bankruptcy in Porto Rico.

(d) *Circuits in which reviews shall be had.* The review under this section shall be in the following circuit courts of appeals: The decisions of a district court of the United States within a State in the circuit

court of appeals for the circuit embracing such State; those of the District Court of Alaska or any division thereof, the United States district court, and the Supreme Court of Hawaii, and the United States Court for China, in the Circuit Court of Appeals for the Ninth Circuit; those of the United States district court and the Supreme Court of Porto Rico in the Circuit Court of Appeals for the First Circuit; those of the District Court of the Virgin Islands in the Circuit Court of Appeals for the Third Circuit; and those of the District Court of the Canal Zone in the Circuit Court of Appeals for the Fifth Circuit.

(e) *Jurisdiction over Federal Trade Commission, Interstate Commerce Commission, and Federal Reserve Board.* The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 45 of Title 15; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 21 of Title 15. (Mar. 3, 1891, c. 517, section 6, 26 Stat. 828; Mar. 3, 1911, c. 231, section 128, 36 Stat. 1133; Jan. 28, 1915, c. 22, section 2, 38 Stat. 803; Feb. 7, 1925, c. 150, 43 Stat. 813; Feb. 13, 1925, c. 229, section 1, 43 Stat. 936.)

JUDICIAL CODE, SECTION 128, AMENDMENTS SUBSEQUENT TO FEBRUARY 13, 1925.

(Judicial Code, section 128, amended.) Appellate jurisdiction.

* * * * * * *

(b) *Review of interlocutory orders or decrees of district courts.* * * *

First. To review the interloctuory orders or decrees of the district courts, including the District Courts of Alaska, Hawaii, Virgin Islands, and Canal Zone, which are specified in Section 227 of this title. (As amended April 11, 1928, c. 354, Section 1, 45 Stat. 422.)

Second. To review decisions of the district courts, under section 159 of Title 45. (As amended May 20, 1926, c. 347, Section 13(a), 44 Stat. 587.)

Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all civil cases wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000; in all criminal cases, and in all habeas corpus proceedings; and in the District Court of the Canal Zone in the cases and modes prescribed in sections 61 and 62, title 7, Canal Zone Code (48 Stat. 1122). (As amended May 31, 1935, c. 160, 49 Stat. 313.)

* * * * * * *

Sec. 504. Appeals and writ of error, how taken. Appeals and writs of error may be taken and prosecuted from the final judgments of the district court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court.

COMPILED LAWS OF ALASKA.

C. L. A. 1933.

Sec. 4510. Next of kin to be guardian. Whenever it becomes the duty of a commissioner to appoint a guardian for a minor, the relatives of such minor, whether male or female, upon application to the commissioner, shall in all cases be appointed, the nearest relative having precedence: provided, said applicant

shall be of good moral character and be otherwise competent to discharge the duties of guardian to such ward.

C. L. A. 1933.

Sec. 4513. Powers and duties of guardian. Every guardian so appointed shall have the custody and tuition of the minor and the care and management of his estate, and shall continue in office until the minor shall have arrived at the age of twenty-one years, or until the guardian shall have been discharged according to law: provided, however, the father of the minor, if living, and in case of his death the mother, while she remains unmarried, being themselves respectively competent to transact their own business, shall be entitled to the custody of the person of the minor and to the care of his education.

C. L. A. 1933.

Sec. 4514. Bond of guardian. Every such guardian shall give bond, with surety or sureties, to the United States, in such sum as the commissioner may order, with conditions as follows:

First. To make a true inventory of all the real estate, and of all goods, chattels, rights, and credits of the ward that shall come to his possession or knowledge, and to return the same to the commissioner at such time as the latter may order;

Second. To dispose of and manage all such estate and effects according to law and for the best interest of the ward, and faithfully to discharge his trust in

relation thereto, and in relation to the custody, education, and maintenance of the ward;

Third. To render, on oath, an account of the property in his hands, including the proceeds of all real estate sold by him, and of the management and disposition of all such property, within a year after his appointment, and at such other times as the commissioner shall direct;

Fourth. At the expiration of his trust, to settle his accounts with the commissioner or with the ward or his legal representatives, and to pay and deliver over all the estate and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be legally entitled thereto.

C. L. A. 1933.

Sec. 4515. Testamentary guardian. Every father may, by his last will in writing, appoint a guardian or guardians for any of his children, whether born at the time of making the will or afterwards, to continue during the minority of the child or for a less time. And every mother may, by her last will in writing, appoint a guardian or guardians for any of her children, to continue during the minority of the child or for a less time: provided, the father of such child or children is dead and has not appointed a guardian, or whenever, by judgment of divorce between such father and mother, the custody of such child or children has been awarded to the mother; and every such testamentary guardian shall have the same powers and per-

form the same duties with regard to the person and estate of the ward as a guardian appointed by the commissioner: provided, nothing in this section shall be construed to deprive either the surviving father or mother of the custody of the person of his or her children, such surviving parent being competent to transact his or her own business.

C. L. A. 1933.

Sec. 4516. Bond of testamentary guardian. Every such testamentary guardian shall give bond in like manner and with like conditions as is required of a guardian appointed by the commissioner: provided, when the testator in a will appointing the guardian shall have ordered or requested that such bond shall not be given, the bond shall not be required, unless from a change in the situation or circumstances of the guardian, or for other sufficient cause, the commissioner shall think proper to require it.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 406

WILHELMINA SUMI,
Petitioner,
vs.
ALSIE M. YOUNG,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to Review a Judgment Dismissing an Appeal from Alaska.

BRIEF FOR RESPONDENT.

STATEMENT.

Respondent Alsie M. Young had been appointed by the will of decedent, Mayme Helen Young, as testamentary guardian of decedent's minor children, under Sections 4515, 4516, 4531, Alaska Compiled Laws 1933 (hereinafter set out at length infra pp. 16, 17). The will having been probated, said respondent applied to the Probate Court (U. S. Commissioner) in Alaska for an order fixing bond as per said sections. The Com-

(NOTE): All italicizing is the writer's. Stars indicate omission of irrelevant matter.

missioner over the objection of one Wilhelmina Sumi, grandmother of the minors, made an order approving said appointment and fixing bond. The grandmother appealed to the District Court for Alaska—Division No. 4, and on the hearing, that Court affirmed said action of the Commissioner; whereupon the grandmother appealed to the United States Circuit Court of Appeals for the Ninth Circuit. Said last mentioned Court, on preliminary motion of respondent, dismissed the said appeal for want of jurisdiction—there being no showing that the matter in controversy had any pecuniary value. The matter comes here on certiorari granted by this Court on November 9, 1936.

The question involved here is as to whether the motion for dismissal of the appeal should have been sustained, or whether said motion should have been denied and the appeal heard on the merits.

The motion to dismiss the appeal was on these grounds, viz.:

1. No question arises under or involves the Constitution of the United States of America.

2. No question arises under or involves any statute or treaty of the United States or any authority exercised thereunder.

3. No monetary value, exclusive of interest and costs, exceeding one thousand dollars ($1000.00) is in controversy herein.

4. The appellant herein was not a party in the Probate Court, Fairbanks Precinct, Alaska, where this proceeding originated, and has no standing in this Court.

CONTENTIONS.

PETITIONER in support of her contention that the appeal should not have been dismissed relies upon the provisions of Sections 4571, 4572, 4573, 4574, Alaska Compiled Laws 1933 (hereinafter set out in full, infra p. 6).

RESPONDENT contends:

A. That the reasons for the dismissal of the appeal, as set forth in the opinion of the Circuit Court of Appeals, copy of which is attached to the petition for certiorari, are sound and cogent; and, in this regard, further that the said provisions upon which petitioner relies have been repealed, so far as concerns appeals to the Circuit Court of Appeals, by the Act of Congress of 1925—same being 28 U. S. C. A. Section 225 (hereinafter set out in substance, infra pp. 13, 14, 15).

B. That petitioner had no appealable interest and that for this, if for no other, reason it was proper to dismiss the appeal.

DISCUSSION.

A.

APPELLATE JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

The jurisdiction of said Court to entertain appeals from the judgments of Alaska Courts is set forth in 28 U. S. C. A. Section 225, pp. 294-295, reading as follows:

Sec. 225 (*Judicial Code,* Section 128, amended) Appellate Jurisdiction.

(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal and writ of error final decisions.

First. * * *

Second. * * *

Third. In the district courts for Alaska or any division thereof * * * "in all cases civil and criminal wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; *in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000* * * * and in all habeas corpus proceedings."

also appellate and supervisory power in bankruptcy proceedings (see 28 U. S. C. A., p. 294, Section 225, sub. c)—also in habeas corpus.

We are unable to see that this statute confers upon ~~this~~ Court jurisdiction to review by appeal the decision of the Alaska Court made in the instant matter.

Certainly it will not be contended that the Constitution or any treaty of the United States is involved—and it is evident also that the matter is neither a habeas corpus nor in bankruptcy.

Equally obvious is it that no statute of the United States nor any authority exercised thereunder is in question. In this regard we have to say: Prior to March 3, 1899, the laws of Oregon, civil and criminal,

so far as applicable, were in force in Alaska, and on the last mentioned date, the Congress provided a Criminal Code for Alaska (30 Stat. 1267), and on June 6, 1900, a Political Code and Code of Civil Procedure for the Territory. (31 Stat. 321.) The said Criminal Code (being laws and regulations for the Territory) was held to exclude United States laws, with reference to criminal procedure in the Territory (*Summers v. United States,* 231 U. S. 92, 34 Sup. Ct. 38, 58 Law. Ed. 137); and by the same reasoning, the Act of June 6, 1900 (31 Stat. 321), providing Codes of Civil Procedure, in which is included our Probate Code, is special legislation for the Territory, and the said law in no sense is a law of the United States generally, or a statute thereof, within the meaning of the statute conferring jurisdiction of appeals from the District Courts of Alaska upon the United States Circuit Court of Appeals in cases where a "statute or treaty of the United States" is involved.

It is true that the Act of 1900 is a law of the United States in the sense that it was enacted by Congress. But nevertheless said Act was enacted by Congress *acting as a local legislature for Alaska,* and it is not a general law of the United States in the sense of the third subdivision of (a) of §225 U. S. C. A.; for if it is to be so considered then there would be no occasion to provide in said subdivision for "in all other cases".

Remains then to be considered only this question, viz., Is the decision which is sought to be reviewed a decision "in a civil case wherein the value in controversy, exclusive of interest and costs exceeds

$1000''? and the Supreme Court of the United States has several times answered *in the negative* the same or analogous questions.

Barry v. Mercein, 5 Howard 103, 12 L. Ed. 712;
DeKraft v. Barney, 2 Black 704;
Kurtz v. Moffett, 105 U. S. 487, 29 L. Ed. 458;
In re Burrus, 136 U. S. 586, 34 L. Ed. 500;
Sims v. Sims, 175 U. S. 162, 44 L. Ed. 115.

BUT PETITIONER CLAIMS that, notwithstanding the provisions of 28 U. S. C. A. Section 225, the appeal in question here is authorized by provisions of Sections 940, 941, 942, 943 ch. 786 of said Act approved June 6, 1900 (31 Stats. 480)—irrespective of the amount involved in the controversy. Said provisions so relied on by petitioner were carried into and became Sections 1772, 1773, 1774, 1775, respectively, of Compiled Laws of Alaska 1913 (a Congressional Compilation) and Sections 4571, 4572, 4573, 4574, respectively, of Compiled Laws of Alaska 1933 (a Territorial Compilation)—said Sections so relied upon read as follows:

"Chapter Ninety
of Appeals in Probate Cases.

"Sec. 940. *Appeals to district court.* There shall be an appeal to the district court of the district of Alaska from all orders of the commissioners exercising the jurisdiction of a court of probate.

Sec. 941. *Exceptions and orders of commissioner.* In the case of decedents any heir, legatee, devisee, creditor, or other person interested in the estate, and in the case of minors, lunatics, and

habitual drunkards, any creditor or relative within the third degree of consanguinity, may file with the commission exceptions to any order of such commissioner granting or revoking letters of administration or of guardianship; allowing semiannual or final accounts; allowing or rejecting claims; directing the payment of debts or legacies, or the distribution of estates; ordering the sale or disposal of real or personal property, or other proceeding. Upon the filing of such exception the commissioner shall make a transcript of all files, papers, and evidence pertaining to such order or proceeding and forward the same to the clerk of the district court.

Sec. 942. *Duty of district judge.* Upon the filing of such exceptions the district judge shall proceed on due notice to hear and determine the same at such time and in such manner as he shall prescribe by order, and for that purpose may receive and entertain affidavits and depositions or hear oral evidence.

Sec. 943. *Proceedings in such cases.* Upon such hearing the district court or judge thereof shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit, which order shall be entered in a docket to be kept by the clerk of the court for that purpose, properly indexed, and a copy of the same shall be forwarded to the commissioner before whom the exceptions were filed, who shall thereupon proceed in accordance with such order. *Such orders shall be deemed a judgment subject to appeal in the manner provided for appeals from judgments in the district court.*"

IN THIS REGARD IT IS PERTINENT to review briefly the germane legislation relating to the Circuit Court of Appeals:

I. The Act of Congress establishing the U. S. Circuit Court of Appeals (Act of March 3, 1891—26 Stats. 828) was entitled.

> "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes."

The subject of appeals from Alaska is not *specifically* mentioned in this Act, but Section 15 of the Act provided that the Circuit Court of Appeals

> "shall have the same appellate jurisdiction, by writ of error or appeal to review the judgments, orders and decrees of the Supreme Courts of the *several territories* as by this act they may have to review the judgments, orders and decrees of the district court and circuit court" etc.

Alaska not then being an organized territory, the question soon arose as to whether or not an Alaska Court which had been established by the Act of May 17, 1884 (23 Stats. p. 24), could be considered to be the Supreme Court of a territory. The said query was answered *in the affirmative,* by the decision of the Supreme Court of the United States in the case of *The Steamer Coquitlam v. United States* (163 U. S. 346, 41 L. Ed. 184—April 20, 1896).

II. The said Act of 1884 was crude and deficient in many respects, but notwithstanding, Alaska managed to get along until 1899 and 1900, when extensive gold

discoveries and increasing population induced Congress to give Alaska a Criminal Code and a Civil Code. The said Civil Code is the said Act of 1900. (31 Stats. 321.) In the interim between the dates of the two acts (i. e., in 1891), the Circuit Court of Appeals had been established.

Section 504 of said Act of 1900 provided as follows:

> "Sec. 504. *Appeals and writ of error, how taken.* Appeals and writs of error may be taken and prosecuted from the final judgments of the district court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; *and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars* the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court."

III. The next Act to be considered is the Act of March 3, 1911 (36 Stats. 1133)—being the Act establishing the Judicial Code.

The title is:

> "An act to *codify, revise* and *amend* the laws relating to the judiciary."

The enacting clause reads:

> "Be it enacted that the laws relating to the judiciary be, and they hereby are *codified, revised and amended,* with title, chapters, head notes and sections, entitled, numbered and *to read as follows.*"

And then follows this, viz.:

Chapter One—District Courts, Organization—(Sections 1 to 23). * * *

Chapter Two—District Courts, Jurisdiction—(Sections 24 to 28). * * *

Chapter Three—District Courts Removal of Causes —(Sections 28 to 39). * * *

Chapter Four—District Courts—Miscellaneous provisions—(Sections 40 to 67). * * *

Chapter Five—District Courts—particular States, (Sections 69 to 116). * * *

Chapter Six—CIRCUIT COURTS OF APPEAL.

Section 116. Establishes nine judicial circuits.

Section 117.

> "There shall be in each circuit a circuit court of appeals (which shall consist of three judges of which two shall constitute a quorum) with *appellate jurisdiction* as hereinafter *limited and established.*"

Sections 118 to and including 134 contain nothing of interest to the question under discussion.

Section 134.

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme

> Court of the United States as provided in Section 247, in which the amount involved or the value of the subject matter in controversy shall exceed *five hundred dollars* (and *in all criminal cases*) writs of error and appeal shall lie *from the District Court of Alaska,* or from any division thereof to the Circuit Court of Appeals and the judgment orders and appeals shall be final in all such cases."

IT IS TO BE NOTED that the language of Section 117 is this, viz.:

> "There shall be in each Circuit a circuit court of appeals * * * with appellate jurisdiction *as hereinafter limited and established.*"

and then follows the "limitations" just referred to; and among those limitations is the limitation contained in Section 134 of said act—by which jurisdiction of appeals of civil cases from Alaska is confined to appeals of cases "in which the amount involved or the value of the subject matter in controversy shall exceed five hundred dollars or more".

This act was passed 11 years after the Act of 1900 re appeals from Alaska in probate cases on which petitioner relies; and the omission in the said Act of 1911 of those provisions of said Act of 1900 which refer to appeals in probate matters necessarily denies the validity of appeals in such cases except when the value of the matter in controversy exceeds five hundred dollars; for, otherwise, such provisions would be absolutely repugnant to that clause of said Act of 1911 which prescribes that the Circuit Court of Ap-

peals is to have appellate jurisdiction *"as hereinafter limited and established"*. Here is an express affirmative limitation and it "implies negative words".

Durusseau v. U. S., 6 Cranch 307;
Railroad Co. v. Grant, 98 U. S. 398, 401.

In all the acts conferring jurisdiction on the Circuit Courts of Appeals, Congress is of course legislating for a Federal, not a local Court; and, too, it is legislating for a Court created by Congress—for a Court with jurisdiction prescribed and prescribable by Congress alone. And so when Congress expressly *limits the jurisdiction* of such a Court, the limitation must, perforce, be of universal application—unless there be in the limiting act some expression providing that the limitation shall not extend to the exercise of jurisdiction in some specified case or matter—and we look in vain for any such "unless" or "except" clause in this Act of 1911; and the act shows on its face that Congress had in mind appeals from Alaska.

IV. Coming now to the Act of February 13, 1925 (43 Stats. 936) amendatory of the Judicial Code: the title is:

> "An Act to amend the Judicial Code and to *further define* the jurisdiction of the Circuit Courts of Appeal and of the Supreme Court, and for other purposes."

and the enacting clause is:

> "Be it enacted * * * that Sections 128, 237, 238, 239 and 240 of the Judicial Code as now existing be, and they are severally, *amended and re-enacted to read as follows:*

(a) The Circuit Courts of Appeals shall have jurisdiction to review by appeal and writs of error final decisions

First * * *

Second * * * In the United States District Courts for *Hawaii* and *Porto Rico in all* cases.

Third. In the District Courts for *Alaska* or any division thereof and for the *Virgin Islands* in all cases civil and criminal where * * *; in all other civil cases wherein the value in controversy exclusive of interest and costs exceeds $1000 * * * and *in all habeas corpus proceedings;* and in the district court for the *Canal Zone* in the cases and mode prescribed in the Act approved Sept. 21, 1922, amending prior laws relating to the Canal Zone.

Fourth. In the *Supreme Courts* of the Territory of *Hawaii* and *Porto Rico* in all civil cases wherein, etc.

Fifth. In the United States Court for *China* in all cases.

(b) Review of interlocutory orders

First * * *

Second * * *

(c) Appellate and supervisory jurisdiction in bankruptcy proceedings.

(d) * * * Appeals from bankruptcy courts in *Alaska* and *Hawaii* to go to Circuit Court of Appeals 9th; from *Porto Rico* to go to Circuit Court of Appeals 1st; from the *Virgin Islands,* to the 3rd; from the *Canal Zone* to the 5th.

(e) Jurisdiction over Federal Trade Commission, Interstate Commerce Commission, Federal Reserve Board.

We look in vain for some expression in the Act of 1925 which points to any exception to the limitations of jurisdiction expressed in the Act. On the contrary, on consideration of the contents of the Act it will be seen that Congress took in the "whole sweep" of appellate jurisdiction; i. e., appeals from Courts on the mainland as well as from territorial Courts, Alaska, Hawaii, Porto Rico, Virgin Islands, Canal Zone, China, etc.

Congress is presumed to have had before it all the law in force on the subject of the jurisdiction of the Circuit Courts of Appeal. It certainly had before it all the laws relating to appeals from Alaska because it "picks and chooses", re-enacting some items,—as for instance the provision for appeals in *habeas corpus,*—changing other items, as for instance raising the requirement as to the amount in controversy from $500.00 to $1000.00, expressly providing for appellate jurisdiction in bankruptcy proceedings, *and entirely omitting* to mention some other items, as for instance, appeals from orders in Probate. As the last above mentioned items are omitted from the revisory act which "further defines" the jurisdiction of the Circuit Court of Appeals, it is apparent that Congress intended to relegate said items to the limbo of abandoned items, except of course when the value of the matter in controversy exceeds $1000.00.

Petitioner's position is that that portion of Sections 941, 942, 943 of the Act of 1900 (supra pp. 6, 7) which relates to appeals to the United States Circuit Court of Appeals from orders of the Probate Court in Alaska in appointing a guardian, is still in force—notwithstanding the said Acts of 1911 and 1925. But the same sections of the said Act of 1900 purport also to allow appeals from orders of the Probate Court allowing or rejecting a claim against an estate, and directing the payment of a debt, and appeals from an order approving an accounting in an estate and in appeals from an order distributing an estate to heirs or legatees—and this would be true, even though the allowed or rejected claim, or the debt, or the amount accounted for, or the amount distributed, should be as small as $10.00 or even less.

Any construction which by any chance might precipitate upon the Circuit Court of Appeals a mass of appeals on such inconsequential matters ought, if reasonably possible, to be avoided.

The section relied upon by petitioner was repealed by implication, because the Act of 1911 and 1925 cover the entire subject.

Murdock v. City of Memphis, 20 Wallace 590, 616-617.

B.

PETITIONER (APPELLANT) WAS NOT A PARTY AND HAD NO APPEALABLE INTEREST.

We think it is manifest that the provision for appeals in guardianship appointments which is mentioned in said Sections 941, 942, 943 of the Act of 1900 has no reference to appointment of *testamentary guardians.*

The Probate Court does not make appointment of a testamentary guardian, such appointment is made solely by the will of the testator. The right of a parent to appoint by will a guardian for his child, is of purely statutory origin—the progenitor of such statutes being 12 Car. II c 24. This statute allowed such right to the father but not to the mother. Originally the Oregon statute followed the parent statute, by granting to the father, but withholding from the mother, such right of appointment (*Ingalls v. Campbell,* 18 Oreg. 461, 24 P. R. 904—Dec. 1889), but the amendment of 1889 gave the right to the mother also (Oregon L. 1891, Sec. 1, p. 87); so, continuously thereafter the Oregon law was, and it now is, as follows:

> "Every father may, by his last will in writing, appoint a guardian or guardians for any of his children whether born at the time of making the will or afterwards, to continue during the minority or for a less time. And every mother may, by her last will in writing, appoint a guardian or guardians for any of her children, to continue during the minority of the child or for a less time: Provided, the father of said child or children is dead and has not appointed a guard-

ian, or wherever by judgment of divorce, the custody of such child or children has been awarded to the mother; and every such testamentary guardian shall have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed by the County Court. Provided nothing in this section shall be construed to deprive either the surviving father or mother of the custody of the person of his or her children, such surviving parent being competent to transact his or her own business."

1 Oregon Code (1930), Sec. 11, 1307.

"Every such testamentary guardian shall give bond in like manner and with like conditions as is before required of a guardian appointed by the County Court. Provided when the testator in a will appointing the guardian shall have ordered or requested that such bond shall not be given the bond shall not be required, unless from a change in the situation or circumstances of the guardian or for other sufficient cause, the County Court shall think proper to require it."

1 Oregon Code Annotated (1930), Sec. 11, 1308.

ALASKA: The statute of Alaska re testamentary guardians was lifted bodily from the Oregon law, the only difference being that in the Alaska statute the word *commissioner is substituted for the words "County Court"* where said words appear in the Oregon statutes.

(Alaska Compiled Laws 1933, Secs. 4515, 4516, 4531.)

And, so, the adjudications of the Oregon Court, prior to the adoption by Alaska of the Oregon statute, are of course of great weight, if not absolutely controlling.

The Oregon Court, speaking of the statute (12 Car. 11 c 24), which conferred upon the father the right of testamentary appointment of a guardian, said (in 1899):

> "The power *thus conferred* when exercised to its fullest extent *invested* the testamentary guardian with an authority over the children, and control of their estates almost as coextensive as that enjoyed by the father himself. His appointment supersedes all other guardians, and all control on the part of the mother. So absolute is this power that it may be exercised in utter disregard of the claims of maternal affection and despite its protests, and commit the custody of the children to a stranger, and embitter the life of the mother by depriving her of the custody of her offspring. It matters not how amiable and refined she may be, how competent in every respect to direct the education and to participate, at least, in the custody of her children, the *paramount right of the testamentary guardian* deprives her of all right to interfere with his custody of them or their education. Said *Lord Chancellor* Cottenham:
>
> 'It is proper that mothers of children thus circumstanced, should know that they have no right as such to interfere with testamentary guardians, and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in

respect of the right in that mother, but it is in consequence of that power which the court has of controlling the power of testamentary guardians.' ''

Ingalls v. Campbell (Oreg.), 24 P. 904.

This case is valuable here as showing that a Court of chancery might, but that no other person or tribunal could, thwart the wishes of the deceased father who had made a testamentary appointment under that parent statute. Of course, much of said decision is valueless now, on account of the fact that the Oregon statute has been amended so as to confer upon the mother the right to make a testamentary appointment in case of the death of the father, intestate. However, all that part of the decision which expounds the history, nature, characteristics and limitations of a testamentary appointment, are as applicable and cogent where the appointment is rightfully made by the mother, as they would be if the appointment had rightfully been made by the father. Certainly, then, *if the mother* had no standing to object as against a testamentary appointment made by the father *before* the amendment, *the grandmother* has no standing to object as against a testamentary appointment made by the mother *after* the amendment.

THE FACT IS THAT A TESTAMENTARY GUARDIAN "IS DISTINGUISHED from guardians at common law, because instituted by statute, and *on the other hand from guardians under judicial appointment because they take their authority under appointment by the father*". *(The American Law of*

Guardianship—Woerner, p. 42, Section 15.) In *Norris v. Harris,* 15 Cal. 226, Judge Field (in January, 1860, at p. 256 of the report) said:

> *"Nor is it necessary, under our statute, that any letters of guardianship should issue to authorize the guardian to act.* The order of appointment, *when made by* the *Probate Court,* constitutes the authority, *and the Will, in case of testamentary appointment, that of guardians in other cases.*
>
> (Note: The California statute of which the Judge was speaking, is substantially the same in this aspect as the Oregon-Alaska statute; and it is to be found at page 488, Vol. 1, General Laws of California, 1850-1864. Theodore M. Hittell.)"

In Volume 1 of Abbott's Probate Law, at page 171, Section 184, it is said that "No petition or notice of his appointment is necessary to be filed or given" (referring to testamentary guardians). It is true that the author refers to the Nevada Code (Nev. 560; see Comm. Cd. Sec. 11).

> "Many of the forms of guardianship recognized at common law have ceased to exist and *only three forms* are now generally recognized, viz.: natural or parental guardianship, *testamentary* guardianship *and* guardianship by judicial appointment."
>
> 4 *Bancroft's Probate Practice,* Sec. 1257, p. 2016;
>
> *Lord v. Hough,* 37 Cal. 657, 668.

The function, then, of the commissioner, under the statute, is *not to appoint* a guardian, but *simply to fix*

the amount of the bond to be required of an already appointed guardian. Such action of the commissioner is committed to his discretion, and if he allows anyone to have a "say in the matter" his act is in *"grace"* but is not in recognition of any *"right"*. Also in the case at bar the Commissioner essayed to "approve the appointment" and to issue letters of guardianship, but there is no statute requiring or authorizing any such action on the part of the Commissioner, as the appointment had already been made by the testator and the fitness of the testator's choice *ipso facto* passed upon.

THE APPELLANT, THEREFORE, IS NOT A PROPER OR LEGAL PARTY TO THESE PROCEEDINGS, AND HAD NO APPEALABLE INTEREST.

No process of the Probate Court, or any other Court, made her such. Neither was she made a party by order or rule of any Court, and especially she was not made a party by any order of the Probate Court of the Fairbanks Precinct, Alaska. She thrust herself into the original proceedings as an objector or protestant. She was, in the eyes of the law, a stranger to those proceedings. The order made by the Probate Court did not invade her legal rights.

The word "party" in its reference to a litigant in Court bears a well-defined legal significance and at no time in the proceedings in the Probate Court or in the District Court was, or at the present time is, the appellant to be considered a party to the proceedings

in the sense that it entitles her to prosecute an appeal to any Court from any order made in these proceedings.

In *Black's Law Dictionary,* 2nd Ed., p. 878, the word "party" is stated to be:

> "* * * a technical word and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or equity; the party plaintiff or defendant * * * and all others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties."

The same authority also says:

> "The term 'parties' includes all persons who are directly interested in the subject-matter in issue, who have a right to make defense, control the proceedings, or appeal from the judgment. Strangers are persons who do not possess these rights."

47 *Corpus Juris,* p. 14, on this subject, Section 1, col. 2, says:

> "The words 'party' and 'parties', when used with reference to suits or actions, are technical words of precise meaning unless it is apparent that they are used in a more popular sense."

3 *Corpus Juris,* p. 616, states the general rule to be as follows:

> "As a general rule, as we shall see in the following sections, the right of appeal is limited to persons (1) who were parties to the action or proceeding, or to the judgment, order, or decree appealed from, (2) who have an interest in the

subject matter or controversy, and (3) who are prejudiced or aggrieved by the decision."

This is a proceeding begun in the Probate Court to fix the bond of a testamentary guardian. There are no parties to the proceeding except the petitioner making the application to have his bond fixed. The petitioner is merely conforming to the requirements of the law in making such application, and the only person interested in the proceeding besides himself is the Probate Judge.

3 *Corpus Juris*, p. 619, states the following:

"In many jurisdictions there are statutes allowing any 'party' aggrieved by a judgment, order, or decree, either generally or of the probate or other particular courts, to appeal therefrom. Under these statutes, as a rule, any person may appeal if he was an original party to the action or proceeding, or if he was afterward brought in as a party, or if he is a party or privy to the judgment, order, or decree complained of, provided he is interested and aggrieved. On the other hand, it is generally held that, to be entitled to appeal, one must have been a party to the action or proceeding blow, or must be a party or privy to the judgment, order, or decree appealed from. If he was not a party originally, he must have made himself a party afterward by some appropriate action, or must have been made a party to the judgment, order, or decree, or must be privy thereto. In some jurisdictions, however, the term 'party' in the statute authorizing appeals from probate or orphans' courts has been construed, not in the technical sense as necessarily importing a litigant before the court in the pro-

> ceeding in which the judgment, order, or decree was rendered, but as including any one on whose interest it has a direct tendency to operate injuriously."

The mere matter of the fixing of the amount of the guardian's bond in no sense can be said to operate injuriously upon the so-called appellant here. To her it was a matter of utter indifference what amount was fixed by the Probate Court as the amount of the bond of the guardian, and that was the only subject matter of the proceeding before the Probate Court. The mere filing of a "Protest" by the so-called appellant in the Probate Court did not make her a party upon the record in those proceedings.

An appeal can be taken only by a party to the record. This is the well settled general law. See *Harrison v. Nixon,* 9 Peters 483, 9 Law. Ed. 201. In this case the Court said:

> "The only parties the Court can know are those in the record. They can not permit counsel who represents parties who may think themselves interested, not in the record, to come in and interfere."

In *Fisher v. Hanna,* 21 Colo. 11, 38 Pac. 421, it was held that a party taking an appeal must have been on the record below. The Court said:

> "It is well settled that to enable one to prosecute an appeal or writ or error, he must be a party to the record in the trial court."

In the case of *Williamson v. Hays,* 25 W. Va. 613, the Court said:

> "It is well settled that a person who is not a party to the proceedings in the court below, in which the judgment complained of is rendered, can not obtain a writ of error to this court from the judgment of the court below."

The Court in that case further held that:

> "To entitle any person to obtain a writ of error or appeal from a judgment, he must be both a party to the cause and aggrieved by the judgment."

The right of the testamentary guardian, Alsie M. Young, to have the Probate Court for the Fairbanks Precinct fix the amount of his bond was an absolute right with which Wilhelmina Sumi was in no way concerned, either in the Probate Court or in the District Court, and she had no standing in either Court to object to the authorized procedure in conformity with the existing law conferring authority on the Probate Court to require of a testamentary guardian a bond in the same manner and with like conditions as is required by the statute of a guardian appointed by the Commissioner. Whatever her rights may have been, she clearly had no right to protest against the exercise by the Probate Court of its proper functions under the law in fixing the bond of a testamentary guardian under a probated will whose validity has never been challenged.

CONCLUSION.

We urge then that the action of the Circuit Court of Appeals in dismissing petitioner's appeal should be affirmed.

Dated, December 28, 1936.

CECIL H. CLEGG,
JOHN L. McGINN,
ROBERT W. JENNINGS,
Attorneys for Respondent.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 406

WILHELMINA SUMI,
Petitioner,

vs.

ALSIE M. YOUNG,
Respondent.

PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully petitions this Honorable Court for a rehearing. Realizing that a lengthy printed document is an added tax on the time and strength of the Court, Petitioner will be brief and will present but a single point for consideration—a point so vital, however, that Petitioner sincerely be-

lieves it warrants a reconsideration by this Court of its decision and Opinion.

Section 943 of the Code of Alaska (Act of June 6, 1900) Petitioner earnestly contends does confer jurisdiction *in the instant case,* and Petitioner urges as follows:

I.

SECTION 943 OF THE ALASKA CODE IS NOT "INCONSISTENT" WITH SECTION 128 OF THE JUDICIAL CODE AS TO THE APPEAL IN THE INSTANT CASE.

This Court, in its Opinion and with reference to Petitioner's contention, says:

> "This proposal is in conflict with the purpose and limitations of the later acts of 1911 and 1925. These are of general application, and *any provision of the Alaska Code concerning appeals to the Circuit Court of Appeals inconsistent with them is ineffective."**

Our prime point in this case has been and is that the provisions of Section 943 of the Alaska Code *are not inconsistent* with the provisions of Section 128 of the Judicial Code.

Section 943 of the Alaska Code is the prior enactment. It covers appeals from all orders, without limitation made by the District Judge in probate cases, and had been in full force and effect for eleven years before the Judicial Code was enacted in 1911.

Other sections of the Alaska Code covering appeals in other Special Proceedings (Writs of Review, Sec-

*Italics throughout are ours unless otherwise indicated.

tion 551; Mandamus, Section 565; Habeas Corpus, Section 608; and Contempt, Section 623) also had been in full force and effect for eleven years before the enactment of the Judicial Code.

And so, too, had been still another section of the Alaska Code (Section 504, Appendix our Brief, page ix) covering appeals in certain specified cases to the Supreme Court of the United States and to the Circuit Court of Appeals,

> "in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars."

Thus, for *eleven years* before the Judicial Code was enacted, there was in existence as a part of the jurisprudence of Alaska, a complete and comprehensive appellate procedure.

When the Judicial Code was enacted in 1911, only one of the above-mentioned sections was carried into it, i. e., Section 504. This became Section 247 of the Judicial Code. The other sections, specified above, including Section 943 "On Appeals in Probate Cases", were left undisturbed—they were not included in the "Repealing Provisions" of the Judicial Code of 1911 (Stat. 1910-1911, p. 1168, Chap. 14), nor were they superseded nor limited by the Judicial Code in any way. In fact, Section 504 (which became Section 247 of the Judicial Code), *excludes* from its provisions all of the subject-matter covered in the sections relating to Special Proceedings (including probate) enumerated above, by specifically providing in its very language that it covers

> "*all other cases* where the amount involved or the value of the subject-matter exceeds five hundred dollars."

In 1925, when the Judicial Code was amended, this Section 247 was repealed, and its subject-matter became a part of Section 128 of the Judicial Code. The jurisdictional limit was increased by this provision:

> "in all other civil cases where the value in controversy, exclusive of interest and costs, exceeds $1000;"

But here again, in 1925, although the "Repealing Provisions" are detailed and extensive (43 Stat. 941) there is no repeal of those sections of the Alaska Code, then in effect for twenty-five years, dealing with Mandamus, Contempt, Writs of Review and Probate Cases. The subject of Habeas Corpus is covered under Section 128. *Therefore, if the enactment of Section 128 of the Judicial Code in 1925 had any effect whatever to supersede or limit the provisions of these enumerated sections of the Alaska Code, then twenty-five years old and themselves enactments of Congress, such effect could only be manifest in those cases where there was a question of dollars and cents involved—a definite value—in controversy.*

We make no contention that Section 128 of the Judicial Code (enacted by Congress in 1925) does not overlap Section 943 of the Alaska Code (enacted by Congress in 1900) *in those cases where there is a definite amount in dollars and cents in controversy.* To that extent only, we submit, it may be said that the Alaska Code Section 943 became "inconsistent" with

the later enactment, Section 128 of the Judicial Code, and therefore "ineffective", as stated in the Opinion herein.

In this connection, counsel desires to correct an answer made by him during oral argument to a question asked by Mr. Justice Cardozo. The question, in substance, was:

> "Is it your contention that Section 943 covers appeals in probate matters from Alaska no matter what amount is involved in controversy."

On the spur of the moment, we answered, "Yes".

That, however, is not our contention. *We do not contend where a matter of dollars and cents is in dispute, that an amount less than $1000 in controversy is appealable under Section 943. That question, we respectfully submit, is not before this Court in the instant case,* and, if the Court please, the Court need not express an opinion thereon as to whether probate matters involving an amount in controversy less than $1000 are appealable or not under Section 943. Here, in the instant case, there is an Order in probate which does not involve a question of dollars and cents, no value whatever in controversy, and therefore there is *no conflict between the provisions of Section 943 and Section 128 of the Judicial Code, which provides for appeals "in all other civil cases wherein the value in controversy * * * exceeds $1000".* The appeal allowed by Section 943 in the instant case is one which has existed since the enactment of the Alaska Code (June 6, 1900). It is different entirely from any provided for in the Judicial Code, and is therefore not "in-

consistent" with the provisions of that Code. The Judicial Code does not purport to be the sole source of jurisdiction of the Circuit Court of Appeals with respect to appeals from the District Courts of Alaska.

II.

THE ORDER MADE BY THE DISTRICT JUDGE—ISSUING LETTERS OF GUARDIANSHIP TO RESPONDENT—IS PALPABLY IN ERROR.

We do earnestly contend that the Order made by the District Judge in the instant case is appealable under Section 943, i. e., the Order granting, in error, Letters of Guardianship to Respondent, and granting these Letters under a mistaken conception of the law of guardianship—that the Court is bound to follow a testamentary appointment regardless of the welfare, best interests and wishes of the minors.

In the instant case, the District Judge, in his Opinion (R. p. 103) says:

> "It is hard to take them away from the grandmother, but I see no alternative unless I violate what I really believe, and that is that Alsie M. Young is a perfectly competent and fit person. I am not finding that the grandmother is not a fit person. I am simply being *governed by that which I think is compulsory—the provision of the Will.*"

The District Judge, having found the testamentary appointee to be a competent and fit person, ruled that the provisions of the Will were compulsory and binding upon him, and this regardless of the best interests,

wishes or welfare of the children. He does speak of his right to set aside the provisions of the Will if he is convinced that they are to the "disadvantage of the children", but he shows that in his mind this "disadvantage" is affected only by the question as to whether or not the testamentary appointee is a "perfectly competent and fit person to have charge of the children".

This view of the law by the District Court we contend is error. The prime consideration, when dealing with minors, is, of course, the welfare and best interests of such minors. It requires no citation of authority to sustain this well-established and age-old doctrine. The testamentary appointment of a guardian of minors is not sacrosanct, is not "compulsory", unless it serves the best interests and welfare of such children. And the best interests and welfare of the minors include the consideration of many factors other than the competency or fitness of the testamentary appointee.

The error of the District Court in holding the provisions of the Will "compulsory" constitutes the principal point urged for reversal of this case on its merits, and presents a substantial question in controversy for determination by the Circuit Court of Appeals (R. p. 59).

III.

THE HUMAN VALUES.

In the instant case, speaking through the cold pages of type and the prosaic argument as to jurisdiction, is the intensely human plight of these two children, about to be taken from their grandmother in Fairbanks, Alaska, where they were born and have been brought up, and to be given into the hands of the Respondent, a rural mail-carrier (R. p. 83) living in the small town of Coleman, Michigan, and who has a family of three children of his own (R. p. 85). No criticism whatever is made as to his fitness, competency or character. These may be and probably are beyond reproach. But it does not necessarily follow that the best interests and welfare of the minors will therefore be served by giving the children into his custody to be "merged", so to speak, with his family merely because they are "bequeathed" to him. He is an absolute stranger to the minors and has not even seen them, nor has his wife nor his own children ever seen them (R. p. 94). These minors are to be taken from their maternal grandmother, who has cared for them more than half of their lives, and with whom they have lived since the death of their mother (R. p. 70), and for long periods of time prior thereto (R. p. 72). The grandmother testified (R. p. 70):

> "I have taken care of them just as though they were my own, furnishing them with food, clothing and schooling. Since the death of Mayme Helen Young, mother of these two children, I have had them with me all of the time." (R. p. 74.)

Furthermore, it was admitted by all parties that the children preferred to stay with their grandmother. The Court says (R. pp. 80-81):

> "I think I shall accept as a condition in this proceeding, without any proof, that in their present situation, having lived a good deal of the time with their Grandmother, that they have a natural affection for her and would like to stay with her. I think I will accept that as the fact, the situation."

Nevertheless, the children are to be given into the custody of Respondent and his family, thousands of miles away from Fairbanks, with the expectation and hope that they will fit into this situation and environment. This is experimenting with the welfare, best interests, and future happiness of these minors in a way which the Courts discourage.

It is perhaps safe to assume that no Court would consider sending these young children on any such doubtful journey, or would thus experiment with their future in that fashion, if the Court had merely to choose between the established fitness and competence of the grandmother and the established fitness and competence of the stranger. As a matter of fact, the trial Court in this case would not have done so either, except that the Court felt itself bound to follow the Will—"I am simply being governed by that which I think compulsory—the provision of the Will" (R. p. 103).

The error of the District Judge of Alaska was flagrant, holding himself bound by the provisions of

the Will, contrary to the overwhelming weight of authority that his first consideration in such a case, and of paramount importance above all others, the cardinal principle to be applied, is the welfare, best interests and happiness of the minors.

Even though the children (now nine and ten years of age [R. p. 117]) are not of legally choosing age, nevertheless their wishes are a circumstance to be taken into consideration. In our Brief on the Merits in the case, filed in the Circuit Court of Appeals, we cited the case of *Willet v. Warren* (Wash.), 76 Pac. 273, where the Court said:

> "And, while it is true that she is not of a choosing age, so far as the law is concerned, her choice, even at a younger age, is a circumstance to take into consideration in her disposition * * * the main consideration is the welfare of the child * * *. The respondent and her husband are not residents of this State. * * * and, while the record discloses nothing against the character of the respondent and her husband, it seems to us, under all the circumstances of this case, in consideration of the comparative locations of the different applicants, one being outside of the jurisdiction of this court and the other within it; * * * that it would be more in conformity with justice and to the best interests of the ward that the relationship existing between Mildred and the Willets should not be disturbed, and that she should be allowed to remain in the house that has sheltered and protected her for so long until she arrives at the age when she can choose her own guardian."

This language is particularly applicable to the instant case, although, of course, the facts are not the same. In the instant case, if the judgment of the District Court is permitted to stand, the children will be taken from their grandmother with whom they wish to remain; and, even though they are not of legally "choosing age", their choice "is a circumstance to take into consideration in (their) disposition"; and they are to be placed in the care and custody of strangers outside of the jurisdiction of the District Court of Alaska. And while the record discloses nothing against the character of the strangers, nevertheless, to use the language of the cited case,

> "under all the circumstances of this case, in consideration of the comparative locations of the different applicants, one being outside of the jurisdiction of this Court and the other within it; * * * it would be more in conformity with justice and the best interests of the ward(s)"

that they be allowed to remain with their grandmother.

The Order and Judgment of the Probate Court (R. p. 31) and the Findings of Fact (R. p. 40) and the Conclusions of Law (R. p. 44) and the Order and Judgment of the District Court of Alaska (R. p. 51), may be searched in vain for any reference whatever to the best interests, welfare and happiness of the minors. The palpable error of the Court below was duly assigned as such (R. pp. 58-59, Assignments of Error II and III).

IV.

REASON FOR THE RULE THAT THE BEST INTERESTS, WELFARE AND HAPPINESS OF THE MINORS SHOULD PREVAIL.

The reason for the doctrine that the best interests, welfare and happiness of the minors should govern, and not the provision in the Will, in and of itself, is obvious. It cannot be said that merely because there appears in the Will of the mother of these minors a provision designating a stranger as and to be the guardian of their persons, that such designation, standing alone, indicates the mother so intended it. Any such interpretation of the Will overlooks entirely the various circumstances and conditions under which it may have been made. No one knows what influences were at work in the mother's mind, how well or ill she was, whether she really knew the full import of the words used in the composition of her Will, or, in fact, whether the Will was indeed her own or the idea of another person entirely, who had, perhaps, by argument, cajolery or influence, caused her to make such provision. This argument is strengthened by certain statements which appear in the Record in the instant case. The Protest filed by the grandmother in the Commissioner's Court recites that the mother,

> "while suffering excruciating physical pain and under the influence of opiates, at her home in Fairbanks, Alaska, and in the absence of her mother the said Wilhelmina Sumi and her sisters and other relatives, did sign what purports to be her Last Will and Testament" (R. p. 8).

And the Motion to Dismiss or For a Continuance (R. p. 13) filed in the Commissioner's Court recites:

> "That her (the grandmother's) daughter, Violet Winbauer, is an important and necessary witness in her behalf in the hearing of this matter; and if present could and would testify that she was at the home of Mayme Helen Young, her sister, before and after March 21, 1934, the day the said sister signed what purports to be her Last Will and Testament; that her said sister suffered intense physical pain both before and after the said day, unless when under the influence of opiates, which were administered to her at frequent intervals, and that on said day she was in no mental condition to make a will; that while she was in the house on said day, she had no knowledge that her sister, Mayme Helen Young was signing a will and only knew that she did after it had occurred."

The above quotation is taken from the Record merely to emphasize the importance of giving effect to the rule that the bests interests and welfare of the minors is controlling, as against the mere testamentary appointment of a guardian.

It cannot have been intended that the District Court of Alaska could thus announce an important rule of law with reference to guardianship, manifestly in error, and yet be the Court of last resort. If this were true, then there might be in effect in each of the four far-flung Districts of Alaska, a different rule of law with respect to this subject matter. Such rule could, in turn, be changed by each succeeding Judge in each District. We submit that Congress did not so intend to vest the District Court of Alaska with any such power.

V.

ALLOWANCE OF APPEAL IN INSTANT CASE IS NOT PREJUDICIAL TO JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

Allowance of the appeal in the instant case will not precipitate upon the Circuit Court of Appeals a mass of appeals in inconsequential matters. All cases concerning dollars and cents in controversy, claims against an estate, payment of debts, accounting, distribution and other matters where a definite amount is in dispute, must be in the statutory amount of $1000 or more, in order to be appealable. *As to all such cases, the provisions of the Judicial Code may be said to govern and to limit the application of Section 943 of the Civil Code of Alaska.* However, we respectfully submit, it is not necessary for the Court to hold that Section 128 of the Judicial Code, and not Section 943 of the Civil Code of Alaska, applies to such cases, because, if you please, *that question is not before the Court.*

The only matter before the Court in the instant case, is the appeal from an Order granting Letters of Guardianship; a matter not resting in any value in controversy whatever, but specifically provided for nevertheless by Section 943. The error of the District Court consists in granting, under a mistaken conception of a rule of law, Letters of Guardianship to a testamentary appointee, solely because the Court held that the provisions of the Will were "compulsory" if he found that the appointee was a fit and proper person.

We repeat that Section 943 of the Alaska Civil Code, by its very language, specifically provides for an appeal from such an Order of the District Judge of Alaska. It states that such an Order

> "shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court."

We submit that Congress intended that there should be a tribunal to correct such errors of District Judges of Alaska, and that Section 943 was, therefore, permitted to remain on the statute books when the Judicial Code was enacted and amended, and that such Section was not repealed nor superseded by the Judicial Code, nor did the Judicial Code limit its application except in those cases where dollars and cents are involved.

The error of the District Judge is not academic nor is it harmless. It is vital, and has an immediate and very serious effect on the lives of two individuals, It should not be permitted to stand.

VI.

THIS IS INDEED THE COURT OF LAST RESORT FOR THESE MINORS.

Only the decision of this Court can now prevent the taking of these children from their grandmother, removing them from Fairbanks, Alaska, into an entirely new and strange environment, and "merging" them with a family they have never seen, and no member of which has ever seen them, thus experimenting,

under doubtful circumstances, with their future. Certainly the decision of the District Judge of Alaska should be reviewed by a superior tribunal so that a correct rule of law shall govern the case; that, regardless of the fitness or competency of the testamentary appointee, the District Judge shall be ordered to take testimony and evidence to determine how the interests, welfare and happiness of the minors shall be best served, and shall be instructed that the provisions of the Will are not "compulsory" if, regardless of the competency of the testamentary appointee, the Judge shall find that the best interests, welfare and happiness of the children require that they should be permitted to remain with their grandmother in Fairbanks.

We respectfully petition the Court for a rehearing and for a ruling that *Section 943 specifically provides for the appeal in the instant case.* In this behalf, we earnestly and respectfully urge that such construction will not place this section "in conflict with the purpose or limitations" of Section 128 of the Judicial Code, nor "inconsistent" with its provisions, but that the appeal provided for by Section 943 is complementary to it; that such decision may specifically state it makes no mention at all of other probate matters, these not being before the Court, particularly claims, debts and accountings concerning items less than $1000, as to whether or not they are or are not covered by Section 943. In this view of Section 943, the words "in the manner" would apply only to allowed and permitted appeals such as that in the instant case, and would not "relieve them (such appeals) of requirements

generally applicable to cases in the Courts of the Territory", as mentioned in the Opinion.

On behalf of these children and their grandmother, we bespeak for them the Court's earnest consideration of this Petition.

Dated, San Francisco, California,
March 17, 1937.

Respectfully submitted,
HERMAN WEINBERGER,
Attorney for Petitioner.

LOUIS K. PRATT,
Of Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the attorney for the Petitioner in the above entitled cause, and that in my judgment the foregoing Petition for Rehearing is well-founded in point of law, as well as in fact, and that said Petition for a Rehearing is not interposed for delay.

Dated, San Francisco, California,
March 17, 1937.

HERMAN WEINBERGER,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 406.—October Term, 1936.

Wilhelmina Sumi, Petitioner, vs. Alsie M. Young. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 1, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

In the Probate Court, Fairbanks, Alaska,—October, 1934,—a contest arose over the appointment of a guardian for two minor children. Petitioner's application failed. Respondent was designated. The District Court heard the matter *de novo* and approved this action.

Upon motion, the Circuit Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction. The motion averred: (1) the cause involves no question arising under the Constitution, statute or treaty of the United States, or any authority exercised thereunder; (2) no monetary value exceeding $1,000.00 is involved; (3) the petitioner was not a party in the Probate Court. Section 128, Judicial Code,[1] also Section 943, Act of June 6, 1900,[2] were relied upon in opposition.

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[1] Judicial Code, Section 128, 28 U. S. C. A. § 225; Act March 3, 1911, amended Feb. 13, 1925, Ch. 229, 43 Stat. 936:

"(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

"

"*Third.* In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in sections 1307, 1324, 1336, and 1341 to 1357 of Title 48." . . .

[2] Act June 6, 1900, Ch. 786, 31 Stat. 480. (Section 943 Carter's Annotated Codes; Section 1775 Compiled Laws of Alaska 1913; Section 4574 Compiled Laws of Alaska 1933):

"Sec. 943. Upon such hearing the District Court or judge thereof shall determine the issues so raised according to the very right of the matter and

The Circuit Court of Appeals could find no question under the Constitution, statute or treaty of the United States, or authority exercised thereunder; nor any controversy concerning money, property, or property rights. It concluded that Section 128, Judicial Code, gave no jurisdiction; also that Section 943, Act June 6, 1900, confers none since it only directs that orders of the District Court of Alaska in probate cases shall be deemed judgments subject to appeal as provided by Section 128.

The petitioner insists that the cause involves construction and application of several Sections Alaska Civil Code,[3] and that jurisdiction is conferred by Section 128; also that Section 943, Act June 6, 1900, is applicable.

Considering *Summers* v. *United States*, 231 U. S. 92, we cannot regard provisions of the Alaska Civil Code as laws of the United States within the intendment of Section 128. They are special or local laws designed to meet conditions peculiar to that Territory. It follows that this Section does not authorize the appeal under consideration. This view is aided by the words "in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000 . . . and in all habeas corpus proceedings." If every case arising under the Civil Code involves a statute of the United States, this clause is inappropriate.

Moreover, to bring within the appellate jurisdiction of the Circuit Court of Appeals every order of the District Court of Alaska concerning guardianship claims against estates, distributions, etc., would hinder the manifest purpose to limit and definitely establish the jurisdiction of that Court disclosed by Judicial Code, 1911, and the amending Act of 1925. The Alaska Civil Code is an elaborate Act of Congress—230 printed pages—which undertakes to prescribe the law on a great many subjects.

The provision of Section 943, Act of June 6, 1900, applicable to appeals in probate cases in Alaska, appears in the margin ante note 2.

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make such order in the premises as he may see fit, which order shall be entered in a docket to be kept by the clerk of the court for that purpose, properly indexed, and a copy of the same shall be forwarded to the commissioner before whom the exceptions were filed, who shall thereupon proceed in accordance with such order. Such orders shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court."

[3] 31 Stat. 321.

Counsel maintain that this must be interpreted as if it read:

"An order of the District Court made in a probate case on appeal to it, shall be deemed a judgment. Such judgment is appealable. The manner or mode of taking and perfecting such appeal shall be the same manner or mode which is provided for the taking and perfecting of an appeal from other appealable judgments made and entered in the District Court."

This proposal is in conflict with the purpose and limitations of the later Acts of 1911 and 1925. These are of general application, and any provision of the Alaska Code concerning appeals to the Circuit Court of Appeals inconsistent with them is ineffective.

Moreover, we cannot accept the view that the words "in the manner provided" found in Section 943 were intended to permit appeals in probate matters without restriction—to relieve them of requirements generally applicable to causes in the courts of the Territory.

The Court below reached the proper conclusion.

Affirmed.

Mr. Justice STONE and Mr. Justice CARDOZO concur in the result, but as they think the case made on the record is not one "involving" provisions of the Alaska Code it seems unnecessary to resolve the more doubtful question whether they are statutes of the United States.

A true copy.

Test:

Clerk, Supreme Court, U. S.